August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to recommend James "Trey" Ferguson for a judicial clerkship position in your chambers. It has been a privilege to teach Mr. Ferguson during his time at Campbell University School of Law. He would be an excellent clerk.

My first experience with Mr. Ferguson was when he was a student in my 1L Criminal Law class. It did not take me long to realize that he was one of those students that professors love to teach—intellectually curious, engaged, and focused. Mr. Ferguson was always prepared, he regularly asked insightful questions, and he frequently visited my office to discuss the course material. Thus, I was not surprised when Mr. Ferguson earned one of the highest grades in the course.

My course was not anomaly. Mr. Ferguson has excelled both inside and outside the classroom here at Campbell Law. He is ranked in the top 5% of his class, and he was recently selected as the Editor-in-Chief of the Campbell Law Review. In recognition of his writing abilities, Mr. Ferguson was chosen by the Legal Writing Director as a Legal Research and Writing Scholar. In that role, he assists other students with their research and writing. Mr. Ferguson's tremendous success at the law school is made even more impressive by the fact that he has achieved it while balancing his responsibilities as a husband and father to young children. He has demonstrated tremendous discipline and a remarkable work ethic.

I would be remiss if I did not point out that Mr. Ferguson is a joy to be around. He is kind, funny, and well-liked by his peers. He would be a welcome addition to any judicial chambers. I recommend Mr. Ferguson without hesitation.

Please let me know if you have any questions.

Sincerely,

Zachary C. Bolitho
Associate Professor of Law

Zachary Bolitho - zbolitho@campbell.edu - (330) 260-0783

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Please accept this letter as my enthusiastic recommendation of Trey Ferguson for a position as your law clerk. Having clerked for two federal judges, I have some familiarity with the day-to-day work of a law clerk and the mutual value that a clerkship can provide both to the clerk and to the judge for whom he works. Based on that experience, and for the following reasons, I believe that Trey would make a fine addition to your chambers.

I've had the privilege of teaching Trey on four occasions here at Campbell University School of Law. Trey was enrollled in both my Property I and Property II courses during his first year of legal studies, and he was enrolled in my Constitutional Law II course during the fall of his second year. He currently is taking my course on Constitutional Litigiation, which focuses on claims brought under 42 U.S.C. § 1983 and similar federal civil rights statutes.

In all of these courses, I have found Trey to be an excellent student in the classroom—always present, consistently prepared for class, and routinely engaged with the material and class discussions. His performance both in the classroom and on examinations easily places him in the upper echelon of our student body, as his class rank and grade-point average demonstrate. Trey earned the highest grade I awarded in his Property II course, and he placed among the top ten students in both Property I and Constitutional Law II. Already this semester, he has made valuable contributions to the discussions in Constitutional Litigiation. He is a standout in a talented class, and I regard him as a most talented and capable student.

I believe it is fair to say that my impression of Trey's talents is demonstrated by his performance outside of my classes, as well. A quick review of his credentials reveals that he currently sits eighth in his law school class, has earned book awards in two of his courses, was selected as a teaching assistant by our Director of Legal Research & Writing ("LRW"), and serves as the Editor-in-Chief for the Campbell Law Review.

In addition to these academic credentials, Trey has gained practical experience in a variety of settings. In addition to serving as a LRW Teaching Scholar, Trey has interned with a federal district judge and a state appellate judge, as well as the North Carolina General Assembly. Additionally, he works part time as an administrative assistant with a local fire department and previously taught mathematics for four years in the local public school system. I have no doubt that these experiences, like his academic ones, will make Trey a benefit to your chambers.

I realize that you receive numerous applications every year from students and recent graduates that have resumes and experiences very similar to those I've described above. What I think sets Trey apart, however, is his genuine likeability. In addition to his intelligence, confidence, and strong work ethic, Trey exhibits several other qualities that, unfortunately, are not always associated with top-level lawyers and law students. He is friendly, amiable, down to earth, and personable. I have very much enjoyed getting to know him, and I think you would, as well.

In sum, I believe that Trey will be an accomplished member of the legal profession, and I warmly recommend him for a position as your law clerk. Not only do I believe that he would serve you well, but I think he would benefit tremendously from the tutelage that you could provide. If I can answer any questions or provide any additional information, please do not hesitate to contact me by telephone at (919) 865-4487 or by email at mkent@campbell.edu. Until then, I remain

Very truly yours,

Michael B. Kent, Jr.
Professor of Law
Campbell University

James "Trey" Ferguson

7613 Longstreet Drive | Raleigh, NC 27615 | 919.995.2946 | jhferguson0613@email.campbell.edu

WRITING SAMPLE

Enclosed is an excerpt of an assignment from my Fall 2019 Advanced Legal Writing course, in which I earned the equivalent of an "A" (97 out of 100). In this assignment, I was tasked with drafting an application for discretionary review to the Georgia State Court of Appeals for my client. In this hypothetical, the state trial court found that my client and his wife were married at common law for the purposes of calculating his monthly alimony payments. This excerpt is the discussion portion of the application for discretionary review.

I. THE PARTIES WERE NOT MARRIED AT COMMON LAW.

Though a finding that the Parties were married at common law is a question of fact, the application of the legal standard is one of law. *Brown v. Brown*, 234 Ga. 300, 302 (1975). This Court reviews questions of law *de novo*. *Suarez v. Halbert*, 246 Ga. App. 822, 824 (2000).

To establish a validly formed common law marriage, prior to 1997, the Parties must: (1) be able to contract for marriage, (2) have an actual contract to be presently married, and (3) have consummated that marriage contract. O.C.G.A. § 19-3-1 (LexisNexis 2019); *Askew v. Dupree*, 30 Ga. 173 (1860); *In re Estate of Love*, 274 Ga. App. 316 (2005); *Fireman's Fund Ins. Co. v. Smith*, 151 Ga. App. 270 (1979); *see also* 1958-59 Op. Att'y Gen. p. 89.

Because Defendant asserted the Parties were married at common law, she bore the burden of proving that such a marriage existed by a preponderance of the evidence. *In re Estate of Legrand*, 259 Ga. App. 67, 69 (2002); *In re Estate of Love*, 274 Ga. App. at 317.

A. THE TRIAL COURT MISSTATED THE LAW OF COMMON LAW MARRIAGE, AND DID NOT HAVE RECORD EVIDENCE TO SUPPORT A FINDING THAT A CONTRACT EXISTED.

The second element of Georgia's common law marriage requires Defendant to demonstrate the Parties *expressly* entered into a *present* marriage contract. Ga. Code Ann. § 19-3-1; *Holmes v. Holmes*, 232 Ga. App. 434 (1998) (citing *Peacock v. Peacock*, 196

Ga. 441 (1943)); *In re Estate of Legrand*, 259 Ga. App. at 69. For this Court's review, this is a mixed question of law and fact. First, concluding that a contract existed is a question of law, and this Court reviews questions of law *de novo*. *Sagon Motorhomes v. Southtrust Bank of Ga.*, 225 Ga. App. 348, 349 (1997). Second, where the trial court sits as the fact finder, the standard of review for factual findings is whether there is any evidence to sustain the trial court's findings. *Sam's Wholesale Club v. Riley*, 241 Ga. App. 693 (1999).

First, in stating the rule for common law marriage, the trial court omitted the actual contract element of the common law marriage test: "[T]he only elements of common law marriage are [1] capacity to contract, [2] intention to live together as husband and wife, and [3] consummation of the agreement." (R. at 103). This declaration misstates the law of common law marriage and, alone, is reversible error.

Second, even if the trial court had applied the correct legal standard, it would not have been able to find evidence of an actual contract for marriage. A contract for marriage is formed when the Parties mutually agree to be husband and wife at some moment in time. *In re Estate of Love*, 274 Ga. App. at 317 (affirming a jury's finding that a decedent and her husband had a common law marriage because the couple had presently agreed to be husband and wife and acted as such); *In re Estate of Legrand*, 259 Ga. App. at 69 (holding that while a landlord and tenant lived under the same roof

and shared their lives with one another, there was no evidence of a "mutual agreement or contract" to be husband and wife).

In the present case, the trial court did not even look for evidence of a contract. Had it looked, the trial court would not have been able to find such evidence because the Parties never had an actual marriage ceremony—or anything similar—to express a *present intent* to be husband and wife. The Parties merely had an "on and off" again discussion about getting married at some future date. (T. at 40; Pl.'s Dep. at 40)

Legrand is analogous to Plaintiff's facts with respect to lacking an express, present marriage contract. As in *Legrand*, in which the couple only lived together, the Parties simply shared a roof and only discussed getting married at some point in the future. An agreement to get married in the future is not enough to establish a present intent to be married. *Peacock*, 196 Ga. at 448

Defendant cannot point to a single occasion, prior to 2012, that the Parties had the requisite meeting of the minds to form a marriage contract. (T. at 1-30). During that time, the Parties could *not* have believed they were legally married because they had a courthouse ceremony in 2012 to gain legal protection.

At trial, Defendant conceded that the Parties only had a courthouse ceremony because she believed their relationship was insufficient to protect her as Plaintiff's legal partner. (T. at 40; Pl.'s Dep. at 40). It was not until a friend explained that she was denied access to her hospitalized boyfriend that Defendant recognized her and

Plaintiff's current set-up was on legally-shaky ground. (*Id.*). Defendant viewed her and Plaintiff's relationship as identical to that of her friend's relationship, which Defendant herself described as only a live-in boyfriend. (*Id.*).

The fact that Defendant was concerned that society would not "assist un-legally married people" shows her view that the Parties did not consider themselves legally married prior to gaining a valid license. (T. at 41). That conversation motivated Defendant to have a courthouse ceremony. At the courthouse, the Parties stood face-to-face and joined hands—and with their hands their hearts—vowing to be together in marital unity.[1] Only at that point did the Parties form the requisite meeting of the minds to establish a marriage contract, and not a day sooner.

Defendant asserts that this ceremony was strictly a formality to provide her adequate *legal protection*. That need to formalize their relationship indicates Defendant believed there was something *legally* insufficient about the Parties' arrangement prior to 2012. Our state's history suggests just the opposite. Our state's import of the English Common Law was meant to protect vulnerable widows in such relationships from being denied access and benefits flowing from her male-partner.[2] This is supported by the fact that a majority of cases—including the ones cited in both the

[1] William Shakespeare, The Third Part of King Henry the Sixth act 4, sc 6.

[2] Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 717-21 (1996) (citing to Georgia's colonial history and its recognition of common law marriages).

Parties' trial briefs—deals with the issue of common law marriage with respect to intestate succession rather than divorce. Defendant seeks to abuse that history of protection for her own selfish gain, for which the doctrine was not established.

Though a ceremony can demonstrate mutual assent to enter into a marriage contract, the Parties could also demonstrate such assent by presenting themselves out to the community as married. *In re Estate of Love*, 274 Ga. App. at 317. Here, the trial court reasoned that Plaintiff's lack of correcting Defendant, when she presented them as husband and wife, was enough evidence to show the Parties put themselves out as married. (R. at 103). However, a lack of evidence does not itself generate evidence to support Defendant's burden that an actual contract existed. (T. at 39-46; Pl.'s Dep. at 27-35). Moreover, as Defendant bore the burden of *affirmatively* proving the Parties put themselves out as married, no evidence corroborates Defendant's mere assertion that the Parties in fact put themselves out as married. *See* part B, sect. 2, *infra*. This error further supports that the trial court lacked any evidence to make a finding that the Parties had an actual contract to marry.

Because the trial court misstated the law and lacked any evidence to make such a finding, this Court should grant Plaintiff's application for discretionary review in order to reverse the finding that the Parties were married at common law.

B. ASSUMING, *ARGUENDO*, THAT THERE WAS A CONTRACT, SUCH A CONTRACT WAS NOT CONSUMMATED AT LAW.

The final element in establishing a common law marriage is that a valid contract for marriage was consummated at law. *In re Estate of Love*, 274 Ga. App. at 317. Consummation is demonstrated by cohabitation *plus* presenting to and being accepted by society as a married couple. *Brown v. State*, 208 Ga. 304 (1951) (ruling that, for the purposes of testifying at his criminal trial, an alleged murderer and his spouse were married at common law because of their cohabitation *and* presentment as husband and wife); *In re Estate of Love*, 274 Ga. App. at 317 (citing *Wright v. Goss*, 229 Ga. App. 393, 394 (1997)).

Here, the trial court treated cohabitation as the "main factor" to prove consummation, which is a misapplication of the appropriate legal standard. (R. at 102). Consummation relies on communal acceptance: society expects a man to leave his parents' house and cleave to his bride, so as to appear as one. *In re Estate of Love*, 274 Ga. App. at 317. No facts in this case meet that expectation. (*Id.* at 102-03).

Whether the court stated and applied the law correctly is a mixed question of law and fact. This Court reviews questions of law *de novo*, *Suarez*, 246 Ga. App. at 824, and questions of fact for clear error, *Sam's Wholesale Club*, 241 Ga. App. at 693.

1. THE TRIAL COURT ERRED IN ITS STATEMENT OF THE LEGAL STANDARD FOR CONSUMATION OF A MARRIAGE CONTRACT AT LAW.

Though cohabitation may raise a presumption of a valid marriage at common law, *Brown*, 208 Ga. at 304, absent proof of an actual marriage contract, cohabitation lacks legal significance. *In re Estate of Legrand*, 259 Ga. App. at 69 (quoting *Holmes*, 232 Ga. App. at 435). Additionally, presenting oneself as married and having general repute in the community as such are equally required elements to prove consummation of a marriage contract. *In re Estate of Love*, 274 Ga. App. at 316-17.

The trial court treated the fact that the Parties lived together in a meretricious relationship as the sole factor in consummating a contract—that the trial court never actually determined existed—and ignored the facts that do not support the indicia of marriage. (R. at 102-03). Cohabitation alone is not enough. *See Id.* at 317-18.

In re Estate of Love highlights the additional facts a court will look to when it determines whether a marriage contract has been consummated at law. The *Love* court determined that the couple was married at common law because they presented themselves as such, and *their actions* were generally accepted by society as evidence of the factum of marriage:

- The couple shared financial accounts and household expenses;
- The couple named each other as beneficiaries on their accounts;
- The couple incurred joint debt—titling a house together;

- The couple made major life decisions with one another; and
- The wife wore a wedding ring.

In re Estate of Love, 274 Ga. App. at 316-17.

This Court's precedent simply does not support the trial court's statement that cohabitation is enough, and that misstatement of law, alone, is reversible error.

2. THERE IS NO EVIDENCE TO SUPPORT EITHER THAT THE PARTIES PUT THEMSELVES OUT AS MARRIED OR THAT THE COMMUNITY VIEWED THEM AS SUCH.

Even if the court had used the appropriate legal standard, the record evidence supports the opposite conclusion—that the Parties did not put themselves out as married and were not accepted by members of the community as such.

In re Estate of Love is distinguishable from the present case with respect to presenting oneself out as married. The court in *Love* weighed the facts in that case in favor of common law marriage, because the indicia of marriage were evident. 274 Ga. App. at 317-18; *see* sect. 1, *supra*. The facts of the present case weigh against such a finding:

- The Parties *did not* share financial accounts until after their official, 2012 ceremony. (T. at 23-27).
- The Parties *did not* have each other named as beneficiaries on retirement accounts. (T. at 42).

- The Parties *did not* share the financial responsibilities of the household; Plaintiff paid the mortgage, the taxes, and the insurance. (T. at 57).

- The Parties *did not* file taxes jointly until 2004. (T. at 29-30, 57).

- The Parties *did not* incur joint debt together until they bought a house together with joint monies in 2004. (T. at 58-59).

- Defendant *did not* include Plaintiff in participating in her parenting decisions, in spite of her assertion that Plaintiff took on a fatherly role for her children. (T. at 74, Pl.'s Dep. at 47).

- The Parties *did not* wear wedding rings—the traditional signal to the rest of the world of one's commitment to marital unity. (T. at 73).

- Defendant *did not* take Plaintiff's name at any point before or after 2012. In fact, Defendant through all relevant periods during the alleged common law marriage, kept the name of her previous husband. (T. at 11, 34-35). When she did change it, in 2002, she changed it to her maiden name, not to Plaintiff's name. (*Id.*). She even corrected those that assumed her name was the same as Plaintiff's. (*Id.*).

In addition to the foregoing facts, Defendant presented no corroborating evidence to support her testimony about the Parties putting themselves out as husband and wife. Such a lack of evidence cannot support the trial court's finding that the Parties put themselves out as married, making it a clearly erroneous finding.

Moreover, Defendant's witnesses were unable to support Defendant's claim that the community perceived the Parties as married prior to the law changing in 1997. That is because one witness only spoke to the Parties' relationship after 1997, and the other witness did not say anything about the Parties' relationship at all. First, Ms. Coates only knew the Parties after 1999, when she and her husband bought the

house next-door. (T. at 10). Second, though Ms. Mason knew Defendant for twenty-six years, Ms. Mason never testified that the Parties' relationship was anything more than live-in companions. (T. at 67-69). Neither testimony support defendant's assertion that the Parties had general repute as to satisfy the consummation element of the test.

Those facts, coupled with the lack of Defendant's evidence to make a contrary finding, show that there was no evidence to support the trial court's finding that the Parties had consummated a marriage contract. Such a glaring absence of evidence is clear error, and calls for this Court to accept Plaintiff's application for discretionary appeal to reverse such a finding.

CONCLUSION

Based on the foregoing, Plaintiff asks the Court to grant this application of discretionary review to evaluate the trial court's determination that the Parties were married at common law in 1993.

James "Trey" Ferguson

7613 Longstreet Drive | Raleigh, NC 27615 | 919.995.2946 | jhferguson0613@email.campbell.edu

WRITING SAMPLE

With permission, I have enclosed a redacted bench memo I prepared for Judge Inman while interning in her chambers at the North Carolina Court of Appeals last fall. This memo analyzes an appeal from a state agency's denial of unemployment benefits for a city police officer.

MEMORANDUM

To: Judge Inman

From: Trey Ferguson

Re: * * *

INTRODUCTION

There is competent evidence in the record that supports the Division of Employment Security's Board of Review's ("Board") determination that Plaintiff-Officer left work *without* good cause attributable to the employer. The standard of review for this Court is prescribed by statute, N.C. Gen. Stat. § 96-15(i), and requires this Court to resolve two issues:

(1) Whether there is competent evidence in the record to support the Board's findings of fact that Plaintiff left work and Defendant-Employer did not terminate him; and

(2) Whether the Board accurately applied the law in concluding that Plaintiff left work *without* good cause attributable to the employer, as to disqualify him from unemployment benefits.

Additionally, Plaintiff raises a third issue on appeal:

(3) Whether omissions from a hearing transcript compel a new hearing.

As Plaintiff fails to present the evidence that was omitted or demonstrate what prejudice he suffered from its omission, an incomplete transcript alone does not afford Plaintiff a new hearing.

FACTS & PROCEDURAL BACKGROUND

Defendant's Chief Orders Officers to Submit to Medical Screening

On 31 March 2017, Defendant Police Chief directed all sworn officers to submit to a mandatory health screening, which included a pre-screening questionnaire. (Rpp. 4 FOF 3, 88-90, 131, and 238). Sergeant * * * ("Plaintiff") claimed to have significant concerns about the questionnaire, specifically its inquiry into his family medical history. (Rpp. 4 FOF 6, 85, 91-92, 131-32).

Plaintiff Refuses to Comply and Turns in His Badge and Credentials

On 19 April 2017, Plaintiff met with the Police Chief and Deputy Chief to discuss his concerns and asked if he could use his own medical provider for the mandatory health screening. (Rpp. 4 FOF 4, 93, 128-29, 140-41). During that meeting the Chief told Plaintiff that he could choose which information to disclose on the questionnaire, but Plaintiff would have to submit to the screening by the contracted providers. (Rpp. 4 FOF 11, 104-05, 107). Plaintiff told the Chief and Deputy Chief that he would not comply with the order, and turned in his badge and credentials. (Rpp. 4 FOF 11, 104-07). Plaintiff said he was "done," and subsequently left the station. (Rpp. 4 FOF 11, 132-33, 138, 180).

After that meeting, the Police Chief informed the department's human resources director that Plaintiff had quit his job. (Rpp. 189-90, 197-98). In a phone call on 20 April 2017, the human resources director told Plaintiff to take compensatory time or

vacation time and not to report to work. (Rpp. 5 FOF 16, 1771-18). The next day, the Police Chief told Plaintiff to turn in his duty weapon because he had quit his job. (Rpp. 5 FOF 17, 110-11, 114-15). On 23 April 2017, Plaintiff sent a letter to Defendant's Town Manager seeking a rehearing and appeal of the decision that he had quit his job; however, the "employer remained firm in its discretion that [Plaintiff] had quit his job." (Rpp. 5 FOF 19, 123-24, 158-59).

Plaintiff Was Denied Employment Benefits, and the Appeals Begin

Plaintiff filed for unemployment benefits, and was referred for adjudication "on the issue of separation from last employment." (Rp. 3). The adjudicator found that Plaintiff was disqualified for unemployment benefits, under N.C. Gen. Stat. § 96-14.5(a).[1] (*Id.*).

Plaintiff appealed that decision to an Appeals Referee, under N.C. Gen. Stat. § 96-15(c)[2]. (*Id.*). The Referee held an evidentiary hearing, and reversed the adjudicator's denial of benefits. (Rpp. 31-34). Defendant timely appealed the Referee's decisions to the Board.

The Board made its own findings of fact and conclusions of law, and reversed the Referee's decision. (Rpp. 3-8). The Board reasoned that Plaintiff had "left work

[1] "An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer."

[2] The statute that governs appeals of unemployment claims.

without good cause attributable to the employer." (*Id.*). Under N.C. Gen. Stat. § 96-15(h), Plaintiff appealed that "Higher Authority Decision" to Superior Court; and the Superior Court affirmed the Board's decision. (Rpp. 256-57). Plaintiff now appeals to this Court. (Rpp. 260-61).

ANALYSIS

Standard of Review

Under N.C. Gen. Stat. § 96-15(i), this Court must determine (1) whether there is any competent evidence to support the Board's factual findings and (2) whether such findings support the Board's conclusions of law. *Miller v. Guilford County Schools*, 303 S.E.2d 411 (N.C. App. 1983) (stating the standard of review for Employment Security Commission[3] decisions).

The Test for Disqualification of Unemployment Benefits

The Division of Employment Security is statutorily required to determine the reason for an individual's separation from work. N.C. Gen. Stat. § 96-14.5(a) (2017). If the Division determined that the individual "left work for a reason other than good cause attributable to the employer," then the individual does not have a right to benefits and is disqualified. *Id.* The employee bears the burden of showing good

[3] The Employment Security Commission was the predecessor to the Division of Employment Security of the Dept. of Commerce. The state legislature changed the name and organization's structure in 2011, but left alone its basic administrative functions.

cause attributable to the employer, and that burden "may not be shifted to the employer." *Id.*

A cause attributable to the employer is a cause the employer produced or created, either through the employer's action or inaction. *Watson v. Emp't Sec. Com'n*, 432 S.E.2d 399, 401 (N.C. App. 1993). "Good cause" is a reason for leaving work that a reasonable person would deem "valid and not indicative of an unwillingness to work." *Marlow v. Emp't Sec. Com'n*, 493 S.E.2d 302 (N.C. App. 1997) (quoting *Watson*, 432 S.E.2d at 401).

Whether Plaintiff Left Work for Good Cause Attributable to the Employer

Plaintiff asserts Defendant's request for family medical history on the contractor's questionnaire was a violation of his rights under the Genetic Nondiscrimination in Employment Act (GINA). 42 U.S.C. § 2000ff-1(b). Defendant argues that the Police Chief told Plaintiff he did not have to disclose that information, and thus Defendant-Employer was not forcing Plaintiff to disclose his family medical history. (Rp. 4 FOF 9).

The Board determined Plaintiff left work and was not discharged by the employer. (Rp. 5 FOF 20). This Court must determine whether there is competent evidence to support that finding, and whether that finding supports the Board's conclusion that Plaintiff's resignation was *not* attributable to the employer. Although

the Police Chief and Deputy Chief's testimonies cast doubt on whether Plaintiff *intended* to resign, their testimony supports the Board's finding that Plaintiff resigned.

On the issue of whether that resignation was attributable to the employer, Plaintiff contends his case is analogous to *Marlow*, 493 S.E.2d 302 (holding that a female employee who left work because of sexual harassment, left for cause attributable to the employer), and *In re Bolden*, 267 S.E.2d 397 (holding that an African-American employee who left work because of racial discrimination, left for cause attributable to the employer).

Plaintiff reasons that if sexual harassment and racial discrimination in the workplace constitutes good cause for leaving employment attributable to the employer, then forfeiting an individual's federally-protected rights—in this case, GINA rights—must also be good cause attributable to the employer. However, the test is whether a reasonable person would deem that cause as valid.

In the present case, there is competent evidence that the Police Chief did not require Plaintiff to fill out the at-issue family medical history. (Rpp. 4 FOF 11, 104-05, 107). It is unlikely, based on the Police Chief's testimony, that a reasonable person would see Plaintiff's reason for leaving work as a valid one because the Chief was not conditioning Plaintiff's further employment on the disclosure of his family medical history. As the Board is the sole judge of factual findings, they are responsible for making that reasonableness determination. As such, the Chief's

testimony supports the Board's conclusion that Plaintiff did not leave work for good cause attribute to the employer. Therefore, there is competent evidence in the record to support that finding.[4]

Whether Voluntariness and Acceptance of Resignation are Required

Plaintiff contends that the Board erred in applying the correct legal standard and must instead make a finding of whether he left work voluntarily before determining his disqualification. Plaintiff cites to *Bunn v. N.C. State University*, which describes the voluntary prong of the unemployment disqualification test. 321 S.E.2d 32, 34 (N.C. App. 1984). However, in 1989, the state legislature amended the statute to remove the voluntary element from the test. *Watson*, 432 S.E.2d at 402. Therefore, voluntariness is no longer an element of the unemployment disqualification test.

In that same argument, Plaintiff also asserts that no one of legal authority accepted his alleged resignation. Plaintiff, in his reply brief, cites to *Hunt v. N.C. Dept. of Pub. Safety* to support this proposition. 817 S.E.2d 257, 267 (N.C. App. 2018). However, *Hunt* is distinguishable from the present case because *Hunt* was dealing with state employees' resignations under the State's Human Resources Act. In the present

[4] Defendant also points out that there is no evidence in the record to show the Defendant-Employer is subject to GINA, as it only applies to specific employers. *See* Defendant's Brief, p. 28-29. However, Plaintiff's Reply Brief suggests they are subject to the federal law, citing Defendant's Human Resources webpage. Further, determinations of such violations are handled by the Equal Employment Opportunity Commission, which—based on the record—have not made such a finding. Plaintiff's Reply Brief suggests supplementing the record to provide that finding. Reply Brief p. 14.

case, Plaintiff is not a state employee and not subject to the statute at issue in *Hunt*. Therefore, whether his alleged resignation was adequately accepted under the "law of resignations" is a non-issue. Accordingly, the Board applied the correct legal standard, prescribed by statute, in concluding Plaintiff left work without good cause attributable to the employer.

Whether an Incomplete Transcript Deprived Plaintiff of Due Process

In parts of the transcript there are omitted and inaudible words. An incomplete transcript is not enough to require a new trial. *State v. Hobbs*, 660 S.E.2d 168, 170 (N.C. App. 2008). Plaintiff must show that the omissions from the transcript prejudiced the outcome of the case. *State v. Hammonds*, 541 S.E.2d 166, 177 (2000). Plaintiff does not specify the prejudice he suffered, and in his reply brief still does not discuss the exact evidence that was omitted from the transcript. As there is evidence in the record to support the Board's findings, the omissions in this transcript were not prejudicial to THE outcome of Plaintiffs' case.

CONCLUSION

There is competent evidence in the record to support the Board's findings of fact. That means the Board's findings are conclusive on this Court's review. As such, their application of the law to those facts is correct, and their determination that Plaintiff left without good cause attributable to the employer should be upheld.

Applicant Details

First Name	**Cara**
Middle Initial	**J.**
Last Name	**Filippelli**
Citizenship Status	**U. S. Citizen**
Email Address	**cfilippelli16@gmail.com**
Address	**Address** Street **116 Woodland Ave** City **Winnetka** State/Territory **Illinois** Zip **60093** Country **United States**
Contact Phone Number	**6303297735**

Applicant Education

BA/BS From	**Texas State University-San Marcos**
Date of BA/BS	**May 2017**
JD/LLB From	**DePaul University College of Law** **http://nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=31402&yr=2011**
Date of JD/LLB	**May 22, 2021**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Journal for Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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Your Honor,

I am a third-year student at DePaul University College of Law set to graduate in May 2021. I am writing to apply for a 2021-2022 term clerkship in your chambers.

I am confident that my legal writing experiences have prepared me for the writing and research required of a judicial clerk. As a student attorney in the DePaul College of Law Criminal Appeals Clinic, I assisted the Illinois Office of the State Appellate Defender in the drafting of opening briefs, a petition for leave to appeal to the Illinois Supreme Court, and a reply brief. Through that position, I realized my affinity for appellate writing and a general appreciation for complex legal research and analysis. I look forward to continuing that work with my internship at the State Appellate Defender this Fall. As a judicial extern for the Honorable Franklin U. Valderrama on the Cook County Circuit Court, I learned how to write from the voice of the Court and how to organize judicial opinions. My current research assistant role, in which I assist in summarizing Illinois Appellate and Supreme Court decisions for the 2021 Supplement to Illinois Criminal Law, has improved my understanding of substantive criminal law and my legal writing organizational skills. Also, as a law clerk at a civil litigation law firm, I have gained perspective into the litigation process of different types of courts by assisting in the drafting of motions, complaints, and other pleadings for matters in state courts, federal courts, and administrative agencies.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample included with my application is a draft memorandum, regarding a motion for summary judgment in an insurance coverage action, written as part of my judicial externship. If another writing sample is preferred, such as one with less editing assistance or one from my criminal appeals clinic, I can provide that as well. Also enclosed are letters of recommendation from Professors John F. Decker and Gilbert Lenz. The Honorable Franklin U. Valderrama of the Cook County Circuit Court, Chancery Division has also agreed to serve as a reference and may be reached at (312) 603-5432.

If there is any other information that would be helpful to you, please let me know. Thank you for your time and consideration of my application.

Respectfully,

Cara Filippelli

CARA FILIPPELLI
116 Woodland Ave Winnetka, Illinois 60093 · (630)-329-7735 · cfilippelli16@gmail.com

EDUCATION

DePaul University College of Law, Chicago, Illinois
Juris Doctor, Expected May 2021
GPA: 3.633/4.000 (Top 15%)

- DePaul College of Law Journal for Social Justice, Fall 2019 and Spring 2020, *Citation Staffer*

Texas State University, San Marcos, Texas
Bachelor of Science in Applied Sociology, May 2017
Minor: Political Science
Overall GPA: 3.45/4.00, Major GPA: 3.69/4.00

EXPERIENCE

DePaul College of Law, Chicago, Illinois
Research Assistant for Professor Emeritus John Decker, May 2020 – Present
Write summaries for recent Illinois Supreme Court and Appellate Court decisions regarding substantive criminal law for annual supplement to Illinois Criminal Law (6th ed. LexisNexis 2018).

Franklin Law Group, Northfield, Illinois
Law Clerk, January 2020 – Present
Assist in drafting pleadings for civil litigation matters including complaints, motions, and letters to various entities (such as insurance companies and administrative agencies). Research legal questions for civil litigation matters, including insurance claims, contract disputes, and professional licensing.

Criminal Appeals Clinic at DePaul College of Law, Chicago, Illinois
Student Attorney, August 2019 – May 2020
Assisted in researching and drafting criminal appeals opening briefs (following bench and jury trial), a reply to State's brief, and Petition for Leave to Appeal in the Illinois Supreme Court. Topics included: plain error doctrine, reasonable doubt, jury waiver, jury instructions. Participated in both the regular criminal appeals clinic and advanced criminal appeals clinic (two semesters).

The Honorable Franklin U. Valderrama (Chancery Division), Circuit Cook County Circuit Court, Chicago, Illinois
Judicial Extern, May 2019 – July 2019
Wrote bench memoranda and drafted judicial orders/decisions on motions in insurance coverage actions. Researched and analyzed issues in pending motions for insurance coverage actions including: proper pleadings for affirmative defenses, required notice, and contested personal service. Attended motion calls, hearings, and rulings; discussed the daily proceedings with the Judge.

Travis County Attorney, Austin, Texas
Office Specialist, May 2017 – June 2018
Utilized software programs to input data regarding citations and legal answers for property tax lawsuits. Provided customer service for questions regarding property tax lawsuits, property foreclosures, and tax sales.

Erwin Law Firm, LLP, San Marcos, Texas
Clerk/Intern, January 2017 – May 2017
Analyzed and discussed discovery for complex capital murder, drug and firearm possession, and domestic violence cases. Observed routine court settings, client meetings, sentencings, and a capital murder trial.

COMMUNITY SERVICE

Chicago Volunteer Legal Services, Client Intake Volunteer, Chicago, IL, November 2018 – April 2019

Cara Filippelli
DePaul University College of Law
Cumulative GPA: 3.633

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Mark Moller	B-	4.00	
Contracts	Gregory Mark	A	4.00	
LARC 1	Jody Marcucci	B+	2.00	
Preparing for Practice I	Lauren Worsek	PA	0.00	
Tort Law	Bruce Ottley	A-	4.00	

Term Honor: Dean's List

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Matthew Lindsay	B	4.00	
Criminal Law	Monu Bedi	A-	3.00	
LARC II	Jody Marcucci	B+	3.00	
Preparing for Practice II	Tiffany Farber	PA	0.00	
Property	Allison Tirres	A-	4.00	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Steven Greenberger	A	3.00	
Externship Program	Elizabeth Boe	PA	4.00	
Externship Seminar	Lester Bovia	PA	1.00	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Joshua Sarnhoff	A-	3.00	
First Amendment	David Franklin	A	3.00	
LARC III	Caroline Vickrey	A	3.00	
Legal Clinic I	Maria Harrigan	A	3.00	
Legal Profession	Ben Trachtenberg	A	3.00	

Term Honor: Dean's List

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Organizations	Lisa Nicholson	PA	4.00	
Civil Rights	Mark Weber	PA	3.00	
Criminal Procedure I	Monu Bedi	PA	3.00	
Legal Clinic II	Gilbert Lez	PA	3.00	

August 25, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This letter is written in support of the application of Cara Filippelli for a judicial clerkship in your office. Because I had Cara in my employ as a research assistant for approximately three months and have carefully examined her level of productivity, I feel I have had the opportunity to assess her potential as a law clerk with the judiciary.

Cara has assisted me by researching and analyzing Illinois Supreme Court and Appellate Court case law which address substantive criminal law issues and writing summaries of the opinions that might be included in the Annual Supplement to my two-volume treatise, Illinois Criminal Law (6th ed. LexisNexis 2018) (with C. Kopacz). In a nutshell, the position requires a student to boil down a court opinion into a succinct but comprehensive description of the arguments, background facts, applicable law, and reasoning the court articulated in the resolution of the issues in dispute. I was immediately impressed with her legal analysis and writing. Her research was thorough, her analysis very insightful and her writing clear and concise. Indeed, I believe Cara is a gifted writer. Her work product seldom needs any edit by me; simply put, she has a legal writing ability I rarely encounter in a law student. Moreover, in my 45-plus years in legal academia, I have had a considerable number of former research assistants succeed as judicial clerks at the federal and state level and believe I understand the qualities that are required to be an excellent clerk. Cara has those qualities.

Cara is a very intelligent, highly motivated, ethical, and personable individual. Cara will be an outstanding judicial clerk and lawyer and will continue to excel in whatever professional direction she chooses. I enthusiastically extend to Cara Filippelli my highest recommendation.

Sincerely,

John F. Decker
Emeritus Professor of Law

John Decker - jdecker1@depaul.edu - 312-362-8701

DEPAUL UNIVERSITY

College of Law
DePaul Legal Clinic
1 East Jackson Boulevard
Chicago, Illinois 60604-2287
312/362-8294
FAX: 312/476-3304

Office Location
25 East Jackson Boulevard
O'Malley Building, 10th Floor

August 12, 2020

Your Honor:

I am writing to enthusiastically recommend Cara Filippelli for a clerkship in your chambers. In Spring 2020, I supervised Cara's work in the Advanced Criminal Appeals Clinic, the second semester of our course where we represent indigent criminal defendants who appeal their convictions. After my colleagues who taught Cara in the first semester of the Clinic strongly supported her application, we accepted Cara into the Advanced Clinic, which accepts no more than two students per semester. I am glad we did, because Cara was the best student I have had in my five years of teaching the Clinic. I believe Cara's performance shows she has the necessary skills and character to be a highly effective judicial clerk.

Cara's primary responsibility in the Advanced Clinic was to draft the Statement of Facts and one argument of the brief we filed in the Illinois Appellate Court for a client who was appealing a conviction for armed robbery. I assigned Cara to a tricky argument concerning the applicability of an instruction designed to caution the jury in its consideration of statements attributed to the defendant by other witnesses. Cara not only gave me high-quality, timely drafts that were responsive to my suggestions, she affirmatively advocated for her own ideas on how to make the brief better. On two specific points, she persuaded me to include paragraphs and citations that I had initially rejected, after explaining how the cited authorities applied to our case in a way I had not fully appreciated. I am grateful for Cara's initiative because it made the brief better.

Cara also worked on two smaller projects. Cara wrote the argument for a Petition for Leave to Appeal to the Illinois Supreme Court, asking the Court to clarify the standard for "closely balanced evidence" under Illinois's plain-error rule. Then, late in the semester, in the middle of her work on her primary project, Cara set that aside to draft an argument for a reply brief in a case where we argued the client's jury waiver was invalid. Cara did excellent work on both projects.

Advanced Clinic students are also expected to mentor students in the first-semester Clinic and offer constructive feedback on their work. Cara took this responsibility very seriously. Cara carefully read the other students' drafts and put considerable thought into her suggestions.

Cara was a delight to work with. She met every deadline, and often turned drafts in early. She is responsive to suggestions, but advocates for her ideas. In short, I think she possesses all the skills necessary to be an effective judicial clerk and I strongly recommend her for a clerkship in your chambers. Please contact me at glenz@depaul.edu if I can be of further assistance.

Sincerely,

Gil Lenz

Gilbert Lenz, Adjunct Instructor

Note: This assignment was part of my judicial externship. Identifying information has been redacted. Party names have been changed to pseudonyms. I received editing assistance and substantive guidance from law clerks and the judge. Please inform me if this writing sample is unacceptable and I will provide another without these limitations.

The case was about an insurance coverage declaratory action and the relevant ruling was on a Motion for Summary Judgment.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

[redacted]	
Plaintiff,	Case No. 2018 CH [redacted]
v.	Honorable Franklin U. Valderrama
[redacted]	
Defendant.	

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiff, [redacted] Insurance Co.'s, Motion for Summary Judgment. For the reasons that follow, Plaintiff's Motion is granted.

BACKGROUND

[redacted] Insurance Co. ("Plaintiff") issued Defendant a Commercial General Liability ("CGL") insurance policy (the "Policy") with an effective policy period of [redacted] to [redacted] bearing number [redacted]. Defendant owns and operates a bar and restaurant. The Policy provides that in the event of an occurrence or offense that may result in a claim, the insured must provide notice to the insurer "as soon as practicable." Further, where a claim is made or suit is brought against the insured, the Policy provides that the insured has a duty to ensure that the insurer receives written notice of the claim or suit "as soon as practicable."

On June 27, 2015, an incident allegedly occurred on the premises at Defendant, in which [redacted] ("The Injured Party") was injured. "The Injured Party" filed suit on June 6, 2016 in the Circuit Court of Cook County entitled [redacted] (the "Underlying Action"), in connection with the incident. An affidavit from a special process server states that [redacted] ("the Registered Agent"), as registered agent for Defendant, was personally served with the Summons and Complaint on July 21, 2016 and personally served January 17, 2017 with a Re-Notice of

Motion and Motion for Default. On June 21, 2017, a Default Judgment was entered against Defendant in the Underlying Action (the "Judgment") in the amount of $100,000.

Plaintiff did not receive notice of the Underlying Action prior to Judgment. On November 21, 2017, a post-judgment citation to discover assets was filed by "The Injured Party" and sent to Plaintiff. Plaintiff received the citation to discover assets on January 10, 2018. On January 18, 2018 Plaintiff filed this declaratory action seeking an order of No Coverage.

MOTION FOR SUMMARY JUDGMENT STANDARD

Summary Judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014); *Safeway Ins. Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1st Dist. 1999). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. *Dockery ex rel. Dockery v. Ortiz*, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Id.* The burden of proof and the initial burden of production in a motion for summary judgment lies with the movant. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his or her case in response to a motion for summary judgment, he or she must present a factual basis that would arguably entitle him or her to judgment under the applicable law. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980).

DISCUSSION

Plaintiff argues[1] that it is entitled to judgment as a matter of law because there is no genuine issue of material fact that Defendant's failure to provide notice of the Underlying Action amounted to a breach of the policy, and therefore Plaintiff does not owe coverage to Defendant for the Judgment that was entered in the Underlying Action. Plaintiff asserts that the gravamen of the case lies in its assertion that it did not receive notice of the Underlying Action until after the Judgment was entered.

In its motion, Plaintiff first requests that the Court default Defendant for want of appearance. Plaintiff asserts that "The Injured Party" has appeared and participated in this action

[1] In support of its motion, Plaintiff submits the following exhibits: (1) Commercial General Liability Policy, Exhibit 1; (2) Declaration Pages; Exhibit 2; (3) Citation to Discover Assets Notice of Citation dated January 10, 2018, Exhibit 3; (4) Default Judgment Order dated June 21, 2017, Exhibit 4; (5) Notice of Motion for Default dated January 23, 2017, Exhibit 5; (6) Affidavit of Special Process Server on Motion for Default dated January 17, 2017, Exhibit 6; (7) Underlying Complaint dated June 6, 2016, Exhibit 7; (8) Order to File Appearance dated October 30, 2018, Exhibit 8; (9) Electronic Docket for Underlying Action dated June 12, 2018, Exhibit 9; (10) *Pro Se* Appearance dated March 7, 2018, Exhibit 10; (11) Affidavit of Special Process Server on Summons and Complaint dated July 21, 2016, Exhibit 11.

via counsel,[2] but that Defendant did not properly appear because although "the Registered Agent" was present in Court, he does not have standing to appear *pro se* on behalf of Defendant. Plaintiff notes that the Court advised "the Registered Agent" that an LLC, like a corporation, must appear via counsel. Pl. Mot., Ex. 8. For these reasons, Plaintiff moves, through its Motion for Summary Judgment, to default Defendant for want of appearance.

Plaintiff's motion foreshadows Defendant's contention that it did not receive proper service in the Underlying Action. Plaintiff alleges that Defendant did not hire counsel to seek to quash service in the Underlying Action[3]. Additionally, Plaintiff asserts that there is a strong presumption of validity of the affidavit of the process server which states that "the Registered Agent" was personally served with the Motion for Default on January 17, 2017. Pl. Mot., Ex. 11. Notwithstanding arguments about the presumption of validity of the affidavit of the process server, Plaintiff maintains that the Judgment in the Underlying Action cannot be attacked here.

The crux of Plaintiff's declaratory action is that Plaintiff is not obligated to defend a case it never received notice of and "[did not] even know existed." Plaintiff asserts that the insured is required, when a claim is made and when a suit is filed, to provide Plaintiff notice. Pl. Mot., Ex. 1 at 20. Plaintiff contends that a Default Judgment was entered in the Underlying Action without investigation, evidence, or any defense, and therefore, Defendant's failure to provide notice is clearly material to this declaratory judgment action. Plaintiff posits that this failure is particularly troublesome in a dram shop situation where factual circumstances are essential. In reference to the Policy, Plaintiff cites *Country Mutual Insurance Co. v. Livorsi Marine Inc.,* 222 Ill. 2d 303, 317 (2006), and suggests that it sets forth the principle that (a) the Court shall enforce the insurance policy [as] written, and (b) that an insured who fails to give notice is in breach. Therefore, argues Plaintiff, if an insurer does not receive reasonable notice of an occurrence or lawsuit, the insured may not recover under the policy, even if lack of notice does not prejudice the insurer, citing *Id.* Nevertheless, Plaintiff asserts that prejudice is obvious in this case.

Plaintiff maintains it is undisputed that neither "The Injured Party" nor Defendant notified Plaintiff of the Underlying Action. Plaintiff argues that the Judgment in the Underlying Action was long-standing and based on personal service. Finally, Plaintiff contends that the Policy was materially breached and therefore, it is entitled to an order of summary judgment declaring that no coverage is owed.

Defendant counters that an insurer must defend an entire case; and that an insurer's obligation to defend is triggered by a claim against the insured with factual allegations that are even potentially within the scope of the policy's coverage, citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d 90, 105 (1992). Further, Defendant asserts that the facts in the Underlying Complaint must be construed liberally and that any doubts regarding the insurer's duty to defend must be resolved in favor of the insured, citing *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.,* 144 Ill. 2d 64, 73 (1991).

[2] Although not listed in the caption, "The Injured Party" is presumably a nominal defendant in this action.
[3] This allegation is outdated, as a Motion to Quash in the Underlying Action was filed on March 5, 2019, after the filing of Plaintiff's Motion for Summary Judgment.

Regarding Plaintiff's assertion that Defendant breached the Policy by failing to provide notice, Defendant retorts that the notice provision of the Policy is not a basis to preclude coverage. Defendant argues that Plaintiff is estopped from raising the exclusion as a defense as there is no exception to the estoppel doctrine for late notice defenses, citing *Employers Insurance Co. v. Ehlco,* 186 Ill. 2d 127, 154 (1999). Darrin's posits that even if the Court were to consider Plaintiff's late notice defense, that it is not a meritorious basis for summary judgment. Highlighting the dispute regarding service on "the Registered Agent", Defendant asserts that "the Registered Agent", as the registered agent for Defendant, was not served in the Underlying Action and that any delay in notice arises from this fact. Defendant argues that the property at which "the Registered Agent" was allegedly served was in foreclosure and that "the Registered Agent" did not reside there at the time of service. Therefore, Defendant asserts that the affidavit of the process server was not truthful, and that "the Registered Agent" did not have notice of the underlying personal injury lawsuit. Defendant contends that these allegations amount to a triable issue of fact which precludes summary judgment. Further, Defendant argues that lengthy passage of time before providing notice to the insurer is not an absolute bar to coverage, as the delay may be considered through a standard of reasonableness. To support this proposition, Defendant cites: *Grasso v. Mid Century Insurance Co.,* 181 Ill. App. 3d 286 (1st Dist. 1989); *American Country Insurance Co. v. Efficient Const. Co.,* Ill. App. 3d 177 (1st Dist. 1991); and *Farmers Automobile Insurance Assoc. v. Hamilton,* 64 Ill. 2d 138 (1976). Defendant maintains that whether the delay of notice was reasonable is a question of fact which precludes summary judgment.

In reply, Plaintiff rejects Defendant's contention that it was not properly served and restates that Defendant cannot collaterally attack the Judgment in the Underlying Action through this declaratory action. Plaintiff argues that Defendant does not have the power to ask the Court to challenge another judge's entry for Default and Default Judgment, citing *Tait v. County of Sangamon,* 138 Ill. App. 3d 169 (4th Dist. 1985). Plaintiff asserts that the public record from the Underlying Action reveals the other court's finding that Defendant was served, defaulted, and that a prove-up Judgment was entered. Plaintiff emphasizes that the entered Judgment may not be collaterally attacked and that Defendant's failure to provide notice to Plaintiff prior to that Judgment is fatal to its contentions here. Plaintiff maintains that it did not receive notice of the Underlying Action prior to the entry of the Judgment.

Next, Plaintiff contests Defendant's assertion that a carrier is estopped from denying coverage if it fails to defend, by arguing that the principle asserted by Defendant lies in an assumption that the insurer had knowledge of the underlying tort suit. Plaintiff suggests that Defendant is "apparently alluding to" *State Farm Insurance v. Martin*, 186 Ill. 2d. 367 (1999). Plaintiff argues that in *Martin*, the duty to defend was triggered by tender of the suit to the insurer. While acknowledging that a duty to defend is owed where the lawsuit is tendered to the insurer prior to default judgment, Plaintiff emphasizes that there is nothing left to defend here, as the Judgment was entered prior to Plaintiff's knowledge of the Underlying Action.

Plaintiff further contends that the underlying incident occurred on June 27, 2015, and that the complaint in the Underlying Action was served on Defendant on July 21, 2016. Plaintiff concludes that Defendant's failure to tender the suit and to provide notice to Plaintiff amounts to

a continued breach of contract; and that Defendant's response impermissibly seeks to collaterally attack the findings regarding service in the Underlying Action.

The Court begins its analysis by addressing, as a preliminary matter, Plaintiff's request to default Defendant for Want of Appearance.

Default for Want of Appearance:

Plaintiff's Motion for Summary Judgment argues that Defendant must be defaulted for want of appearance, as "the Registered Agent"'s *pro se* appearance on behalf of Defendant lacked standing. Despite its assertion that the Court informed "the Registered Agent" that his appearance on behalf of Defendant lacked standing, Plaintiff has not attached any transcript or order encapsulating that statement. While it is true that an LLC, like a corporation must be represented by counsel, an appearance by a *pro se* on behalf of an LLC would be a potential nullity, rather than an issue of standing. *Downtown Disposal Servs. v. City of Chicago*, 2012 IL 112040. Defendant's response does not address Plaintiff's assertions regarding default for want of appearance.

This Court entered an order on October 30, 2018 giving Defendant until November 29, 2018 to file a proper appearance. This action was continued by the Court for presentation of substantive motions. At the January 24, 2019 presentment date, Defendant was not present nor represented in Court and this Motion for Summary Judgment was set for ruling on February 13, 2019. On February 13, 2019, Defendant's counsel was present in Court and the ruling on Plaintiff's Motion for Summary Judgment was continued to March 11, 2019. Pursuant to an April 29, 2019 order, Defendant was granted leave to file a response to the Summary Judgment Motion.

A default judgment "may be entered for want of an appearance or for failure to plead." 735 ILCS 5/2-1301(d) (West 2018); *Wilkin Insulation Co. v. Holtz*, 186 Ill. App. 3d 151, 155 (1st Dist. 1989). A defendant who has shown a pattern of deliberate delay or a lack of diligence and has ignored the court's commands or treated them with indifference does not have the right to insist he be allowed to defend. *Id.* Repeated violations of the court's orders and a continuous disregard for the court's authority are themselves sufficient to justify the exercise of the court's discretion to enter judgment against defendant. *Id.* Entry of a default judgment is a matter within the discretion of the trial court. *Id.*

Here, Defendant presently has counsel of record. After counsel's appearance was filed, the Court granted leave for Defendant to file a late response to the Summary Judgment Motion. For these reasons, the Court disregards Plaintiff's request that Defendant be defaulted for want of appearance and moves on to address the arguments which pertain to Summary Judgment.

The Policy:

The Court turns to Plaintiff's assertion that there is no genuine issue of fact that Defendant's breached the Policy. Plaintiff argues that it is entitled to judgment as a matter of law because Defendant's failure to provide notice of the Underlying Action to Plaintiff amounted to a breach of the Policy, and therefore Plaintiff does not owe coverage to Defendant for the Judgment that was entered in the Underlying Action. The relevant provisions of the Policy provide, in pertinent part:

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

…

2. Duties In The Event Of Occurrence, Offense, Claim, Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or offense which may result in a claim.

…

b. If a claim is made or "suit" is brought against any insured, you must:
(1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as practicable.

Plaintiff's Mot., Ex. 1, p. 20.

The construction of an insurance policy, and a determination of the rights and obligations thereunder, are questions of law for the court which are appropriate subjects for disposition by way of summary judgment. *Crum v. Forster Managers Corp. v. Resolution Trust Corp.,* 156 Ill. 2d 384, 391 (1993). In construing a policy, the court's primary function is to ascertain and give effect to the intention of the parties as expressed in the policy language. *Founders Ins. Co. v. Munoz,* 237 Ill. 2d 424, 433 (2010).

The Policy provides that the insured must notify the insurer, as soon as practicable, of both: (1) any occurrence or offense which may result in a claim, and (2) any suit brought against the insured. Plaintiff asserts that Defendant has breached both relevant provisions of the Policy and therefore, Plaintiff does not owe coverage for the Judgment in the Underlying Action.

As the movant, Plaintiff bears the burden of making a prima facie showing that there are no genuine issues of material fact. *Williams,* 316 Ill. App. 3d at 689. Here, Plaintiff has provided the Court with the Policy, Default Judgment in the Underlying Action, affidavits from the process server, and other exhibits to support its contention that no issue of material fact exists. The Court finds that Plaintiff has met its initial burden by showing, through the language of the Policy, that Defendant owed a duty to provide Plaintiff notice of the Underlying Action. It is undisputed that Defendant did not provide notice to Plaintiff during the course of the Underlying Action. Because Plaintiff met its initial burden, the burden then shifts to Defendant, as the non-movant, to present a factual basis that would arguably entitle it to judgment. *Pielet,* 407 Ill. App. 3d at 490.

Proper Service in the Underlying Action:

The crux of Defendant's defense lies in its assertion that Defendant did not receive proper service, and that this alleged fact is the reason for the delay in providing notice to Plaintiff. On June 21, 2017, a Default Judgment was entered against Defendant in the Underlying Action. Plaintiff counters that it is entitled to judgment as a matter of law because the disputed service in the Underlying Action was already resolved by the Default Judgment, and that Judgment cannot be collaterally attacked here.

The Court notes that Defendant filed a Motion to Quash service of Summons and Complaint in the Underlying Action in Law division. The motion was denied on July 9, 2019.[4] Given this determination, the Court will proceed to address the parties' arguments regarding proper service in the present motion for Summary Judgment.

Affidavits from the special process server in the Underlying Action provide that "the Registered Agent", as registered agent for Defendant, was personally served with the Summons and Complaint on July 21, 2016 and with the Re-Notice of Motion and Motion for Default on January 17, 2017. Pl. Mot., Ex. 6 and Ex. 11. Citing *Service Fed. Savings v. Manley*, 2015 IL App (1st) 143089, Plaintiff asserts that the affidavit from the special process server carries a strong presumption of validity because it provides that "the Registered Agent" was personally served. In response, Defendant alleges that the property where "the Registered Agent" was allegedly served was in foreclosure and that "the Registered Agent" no longer resided there. Therefore, argues Defendant, the affidavit of the process server is not truthful. In Illinois, the process server's return affidavit is prima facie evidence of proper service, and the affidavit of service should not be set aside unless impeached by "clear and convincing evidence." *Id.* ¶ 37. A court indulges in every reasonable presumption in favor of the affidavit's validity, and the uncorroborated account of the party served does not suffice to set aside that evidence. *Id.* To impeach the affidavit of service, the defendant needs affirmative evidence. *Id.* The Court notes that Defendant has not presented affirmative evidence here to support its contention that the affidavit from the special process server is untruthful. However, a presumption of validity is not necessary in this case, as the sufficiency of the affidavit was resolved in the Underlying Action when Judge [redacted] denied the Motion to Quash.

Plaintiff further asserts that Defendant is impermissibly seeking to collaterally attack the Judgment in the Underlying Action through this declaratory action, citing *Tait v. County of Sangamon,* 138 Ill. App. 3d 169 (4th Dist. 1985). The Court notes that *Tait* involved a criminal defendant's collateral attack on costs assessed in criminal proceedings. *Id.* The Court finds the facts and precedent set forth in *Tait* to be distinguishable from the insurance declaratory action here.

"A collateral attack on a judgment is an attempt to impeach that judgment in an action other than that in which it was rendered." *Buford v. Chief, Park District Police,* 18 Ill. 2d 265, 271 (1960). "Under the collateral attack doctrine, a final judgment rendered by a court of competent jurisdiction may only be challenged through direct appeal or procedure allowed by statute and remains binding on the parties until it is reversed through such a proceeding." *Apollo Real Estate Inv. Fund IV v. Gelber,* 403 Ill. App. 3d 179, 189 (5th Dist. 2010).

In the Underlying Action, a Default Judgment against Defendant was entered on June 21, 2017 and provides that all parties have been personally served. Pl. Mot., Ex. 4. Despite its contention that "the Registered Agent" was never properly served, Defendant waited almost two years to bring a Motion to Quash in the Underlying Action. The issue of proper service was resolved by Judge [redacted]'s denial of Defendant's Motion to Quash. Therefore, the Default

[4] Decided by Judge [redacted], Case No. [redacted].

Judgment stands. The Court finds that the Judgment in the Underlying Action cannot be collaterally attacked through this Motion for Summary Judgment, as the Court here does not have authority to decide a factual allegation which has already been resolved by another competent court. *Id.* For that reason, arguments disputing Defendant's proper service in the Underlying Action are improper here.

Duty to Provide Notice Under the Policy:

As to its duty to provide notice under the Policy, Defendant contends that lengthy passage of time is not an absolute bar to coverage; and that late notice delay may be considered under a reasonableness standard which examines the facts and circumstances of the particular case. To support this proposition, Defendant cites *Grasso v. Mid Century Insurance Co.*, 181 Ill. App. 3d 286 (1st Dist. 1989); *American Country Insurance Co. v. Efficient Const. Co.*, 225 Ill. App. 3d 177 (1st Dist. 1992); and *Farmers Automobile Insurance Assoc. v. Hamilton*, 64 Ill. 2d 138 (1976). While Defendant does not develop this argument into a defense and fails to show a connection to the provisions of the Policy, the Court notes that the cases cited pertain to facts and circumstances regarding whether a reasonable person would expect a claim or insurance coverage regarding incidents that occurred in those cases. Lacking clarification from Defendant, the Court finds that its arguments regarding reasonableness of delay are limited to Defendant's failure to provide notice of the "occurrence" in the Underlying Action. Even if the failure to notify Plaintiff of the underlying incident were relieved by a reasonableness standard, Defendant's failure to provide notice of the Underlying Action is unexcused by its reasonableness of delay arguments. Given the limited scope of these arguments, Defendant's failure to provide notice of the Underlying Action remains at issue.

Plaintiff maintains that Defendant's failure to provide notice of the Underlying Action amounts to a breach of its obligations under the Policy; relieving Plaintiff from any duty to provide coverage for the Judgment. Although the Underlying Action has already been resolved, Defendant counters that Plaintiff owed a duty to defend in it and therefore, must provide coverage for its Judgment. Defendant asserts that an insurer's duty to defend is triggered by a claim against the insured alleging facts that are within, or even potentially within, the scope of the policy's coverage, citing *Outboard Marine*, 154 Ill. 2d at 105. Plaintiff responds that an insurer's duty to defend is only triggered upon tender of the lawsuit. Further, Plaintiff emphasizes that there is nothing left to defend here, as the Default Judgment in the Underlying Action was entered prior to Plaintiff's notice of the its existence. The Court notes that in *Outboard Marine* the underlying suit was "tendered" to the insurer. *Id.* at 98. Here, Defendant did not provide notice of the Underlying Action nor tender it to Plaintiff. Further, the Court agrees with Plaintiff that an alleged duty to defend triggered post-judgment presents difficulties in establishing the scope of that duty.

Finally, Defendant contends that Plaintiff is estopped from raising the notice provision of the Policy as a basis to preclude coverage. To support this contention, Defendant cites *Ehlco*, 186 Ill. 2d at 148, which asserts that under the estoppel doctrine, an insurer which breaches its duty to defend is estopped from raising policy defenses to coverage. However, *Ehlco* also provides that application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered. *Id.* at 151. These circumstances include where

the insurer was given no opportunity to defend; where there was no insurance policy in existence; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage. *Id.* Further, *Ehlco* found that lack of a tender by the insured does not relieve the insurer of its duty to defend if the insurer had "actual notice" of the underlying suit. *Id.* at 143. "Actual notice" means that the insurer knows both "that a cause of action has been filed and that the complaint falls within or potentially within the scope of the coverage of one of its policies." *Id. Ehlco* found that the parties had not sufficiently pled actual notice and remanded the case to allow the parties to amend their pleadings. Here, the Court finds that Defendant's citation and reference to *Ehlco* misses these essential principles. Defendant has not established that Plaintiff had actual notice of the Underlying Action. Further, Plaintiff was not given an opportunity to defend because its duty to defend was not properly triggered during the course of the Underlying Action. Therefore, Plaintiff is not estopped from raising the notice provision as a basis to preclude coverage.

The Court finds Plaintiff met its initial burden by establishing that, pursuant to the Policy, Defendant owed a duty to provide notice of the Underlying Action. Defendant does not dispute its failure to provide notice, rather its defense is improperly based upon disputed service in the Underlying Action. Given its failure to properly show why it did not provide Plaintiff with notice, the Court finds that Defendant breached the Policy and is not entitled to coverage for the Judgment entered in the Underlying Action.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted.

ENTERED:

_____

Franklin U. Valderrama, Judge Presiding

DATED: [redacted]

Applicant Details

First Name	**Steve**
Last Name	**Fisher**
Citizenship Status	**U. S. Citizen**
Email Address	**steven.fisher@student.american.edu**
Address	**Address** Street **651 8th St NE** City **Washington** State/Territory **District of Columbia** Zip **20002**
Contact Phone Number	**7034037487**

Applicant Education

BA/BS From	**North Carolina State University**
Date of BA/BS	**May 2010**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 17, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Anderson, Jonas
janderson@wcl.american.edu
202-274-4273

Robbins, Ira
robbins@wcl.american.edu
(202) 274-4235

Beske, Elizabeth
beske@wcl.american.edu
202-274-4302

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Steve Fisher
651 8th St NE Washington, D.C., 20002 | 703-403-7487
Steven.Fisher@student.american.edu

June 13, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at American University Washington College of Law and am writing to express my strong interest in a judicial clerkship in your chambers after I graduate in May 2022. I believe that my successful record of academic achievement, previous work experience, and demonstrated legal research and writing skills have prepared me to be a valuable contributor in your chambers. I would be thrilled by the opportunity to participate as a judicial clerk in this legal community.

After graduating from N.C. State University with a degree in aerospace engineering and working for eight years in the satellite telecommunications and remote imaging industries, I am excited to transition to a legal career in litigation. I feel fortunate to be able to draw on those engineering skills and professional experiences and apply them in the legal context. As a satellite engineer, I analyzed complex satellite requirements and documents to build precise flight software, provided creative and novel solutions to logistical and technical problems, and presented my work publicly, internally, and to my previous company's clients.

My attention to detail, critical and creative thinking, and communications skills that I developed professionally have translated well to the legal context. I was selected from a competitive pool of applicants to serve as a Dean's Fellow to the Legal Rhetoric Program, and I was one of twenty-seven to join the *American University Law Review* through the write-on competition. *AULR* also selected my student Comment for publication in its Volume 70.3 issue, and I recently began my new role as its Managing Editor. Last summer, I further developed my legal research and writing skills by drafting, editing, and conducting research for Professor Ira Robbins' academic articles as his Research Assistant and continued my work with Professor Robbins through the academic year. I look forward to the opportunity to assist you while learning about procedure and practice from your point of view.

I have included my resume, unofficial law school transcripts, and a writing sample. I welcome the opportunity to speak further about my qualifications. Thank you for your time and consideration.

Sincerely,

Steve Fisher

Steve Fisher

651 8th St NE Washington, D.C. 20002 | 703-403-7487
Steven.Fisher@student.american.edu

EDUCATION

American University Washington College of Law, Washington, DC
Juris Doctor candidate, May 2022; GPA 3.87 (Top 5%)
Journal: Managing Editor, *American University Law Review*, Volume 71
Awards: Certificate of Excellence (outstanding performance on Legal Rhetoric Citation Exam); Highest grade designation, Legal Rhetoric Fall 2019
Publications: *Protecting Genetic Identity with the Right of Publicity: Applying California's Common Law Right of Publicity to Direct-to-Consumer Genetic Testing* 70 AM. U. L. REV. 1217 (2021).

North Carolina State University, Raleigh, NC
Bachelor of Science in Aerospace Engineering, *cum laude*, May 2010; GPA 3.43

EXPERIENCE

Covington & Burling LLP, Washington, DC
Summer Associate, May 2021 – present
- Assisting on various legal projects through research and drafting legal memoranda

American University Washington College of Law, Washington, DC
Research Assistant, Professor Ira P. Robbins, May 2020 – April 2021
- Performing legal research, drafting, and editing for Professor Robbins' upcoming scholarly publications

Dean's Fellow, Legal Rhetoric Department, August 2020 – April 2021
- Assisting in teaching 1Ls foundational legal citation, research, and writing through weekly presentations and exercises; preliminary grading and guidance for memo drafts

Teaching Assistant, Property, Professor Jonas Anderson, January 2021 – April 2021
- Writing short quizzes to test students' comprehension of fundamental concepts, providing supplemental assistance during office hours

Intelsat Corporation, McLean, VA
Flight Dynamics Engineer, 2013 – 2015 | *Senior Flight Dynamics Engineer*, 2015 – 2019
Part of a 16-member team responsible for over 75 telecommunications satellites
- Orbital mechanics operator and software developer for Intelsat's proprietary flight dynamics software suite

Significant Accomplishments
- Close Approach Detection and Management: created web-based collision avoidance system; presented at Space Situational Awareness Users' Conference (Denver 2016)
- Migration of Satellites to Intelsat Flight Dynamics Software: integration of all Intelsat satellites onto one software platform

GeoEye, Inc. (now DigitalGlobe), Herndon, VA
Mission Controller, 2012 – 2013

ACTIVITIES AND INTERESTS

Completed written and practical training for private pilot licensure; Ice hockey and soccer player; avid Washington Capitals and Arsenal FC supporter

FISHER STEVEN 4894357 05/10

06/03/21 1 OF 1

FALL 2019

LAW-501	CIVIL PROCEDURE	04.00	A	16.00
LAW-504	CONTRACTS	04.00	A	16.00
LAW-516	RESEARCH & WRITING I	02.00	A	08.00
LAW-522	TORTS	04.00	A-	14.80

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 54.80QP 3.91GPA

SPRING 2020

LAW-503	CONSTITUTIONAL LAW	04.00	P	00.00
LAW-507	CRIMINAL LAW	03.00	P	00.00
LAW-517	RESEARCH & WRITING II	02.00	P	00.00
LAW-518	PROPERTY	04.00	P	00.00
LAW-550	LEGAL ETHICS	02.00	P	00.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 0.00QP 0.00GPA

FALL 2020

LAW-508	CRIMINAL PROCEDURE I	03.00	A	12.00
LAW-633	EVIDENCE	04.00	B+	13.20
LAW-688	PATENT LAW	03.00	A	12.00
LAW-796F	LAW REVIEW I	01.00	--	--.--
LAW-799	LEGAL RESEARCH PROJECT	03.00	A	12.00

LAW SEM SUM: 14.00HRS ATT 13.00HRS ERND 49.20QP 3.78GPA

SPRING 2021

LAW-605	CONSTITUTIONAL LAW: 1ST AMEND	03.00	A-	11.10
LAW-643	FEDERAL COURTS	04.00	A	16.00
LAW-724	BANKING & FIN INST: U.S. REG	03.00	A	12.00
LAW-796S	LAW REVIEW I	01.00	--	--.--
LAW-799	LEGAL RESEARCH PROJECT	03.00	A	12.00

LAW SEM SUM: 14.00HRS ATT 13.00HRS ERND 51.10QP 3.93GPA

FALL 2021

LAW-611	BUSINESS ASSOCIATIONS	04.00	--	--.--
LAW-769	EXTERNSHIP SEMINAR	02.00	--	--.--
LAW-795CT	SECTION 1983 LITIGATION	03.00	--	--.--
LAW-798F	LAW REVIEW EDITORIAL BOARD	02.00	--	--.--
LAW-805	LAW OF INFORMATION PRIVACY	03.00	--	--.--

LAW CUM SUM: 57.00HRS ATT 55.00HRS ERND 155.10QP 3.87GPA

END OF TRANSCRIPT

North Carolina State University

Unofficial Transcript

Name: Steven Anthony Fisher **Student ID:** 000791297 **Birthdate:** 1988-05-10

Print Date: 2013-04-17

- - - - - Degrees Awarded - - - - -

Degree: Bachelor of Science
Confer Date: 2010-05-15
Degree Honors: Cum Laude
Plan: Aerospace Engineering

- - - - - Beginning of Undergraduate Record - - - - -

2006 Fall Term

Plan: Aerospace Engineering Unmatric
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
CH 101	Chem Molecular Sci	3.000	3.000	A	12.000
CH 102	Gen Chem Lab	1.000	1.000	A+	4.333
E 101	Intro Engineering	1.000	1.000	A	4.000
E 115	Computing Environ	1.000	1.000	S	0.000
ENG 101	Acad Writing Rsch	4.000	4.000	B	12.000
MA 141	Calculus I	4.000	4.000	CR	0.000
MA 241	Calculus II	4.000	4.000	A	16.000
PE 256	Racquetball	1.000	1.000	B	3.000
PS 201	Intro to Amer Govt	3.000	3.000	CR	0.000
Term GPA: 3.667	Term Totals:	22.000	22.000	14.000	51.333

Semester Dean's List

2007 Spring Term

Plan: Aerospace Engineering Unmatric
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
CH 201	Chem-A Quanti Sci	3.000	3.000	A-	11.001
CSC 112	Intro Comp Fortran	3.000	3.000	A-	11.001
EC 205	Fund of Econ	3.000	3.000	B+	9.999
MA 242	Calculus III	4.000	4.000	B	12.000
PY 205N	Physics Engr I Trd	4.000	4.000	B	12.000
Term GPA: 3.294	Term Totals:	17.000	17.000	17.000	56.001

Semester Dean's List

2007 Fall Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
GC 120	Found of Graphics	3.000	3.000	A-	11.001
HI 341	Technol in History	3.000	3.000	B+	9.999
MA 341	Appl Diff Eq I	3.000	3.000	A+	12.999
MAE 206	Engineering Static	3.000	3.000	B+	9.999
PY 208N	Physics Egr II Tra	4.000	4.000	B	12.000
Term GPA: 3.500	Term Totals:	16.000	16.000	16.000	55.998

Semester Dean's List

2008 Spring Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
MAE 208	Engineer Dynamics	3.000	3.000	C	6.000
MAE 261	Aero Vehi Perform	3.000	3.000	A-	11.001
MAE 314	Solid Mechanics	3.000	3.000	B-	8.001
MAE 453	Intro Space Flight	3.000	3.000	A	12.000
MSE 201	Struc Prop Eng Mat	3.000	3.000	B	9.000
Term GPA: 3.067	Term Totals:	15.000	15.000	15.000	46.002

2008 Fall Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
ENG 282	Intro to Film	3.000	3.000	A-	11.001
MAE 301	Engr Thermodyn I	3.000	3.000	B	9.000
MAE 355	Aerodynamics I	3.000	3.000	B+	9.999
MAE 357	Exper Aerodyn I	1.000	1.000	B+	3.333
MAE 371	Aerosp Struct I	3.000	3.000	B+	9.999
MAE 461	Dynam & Controls	3.000	3.000	B	9.000
Term GPA: 3.271	Term Totals:	16.000	16.000	16.000	52.332

Semester Dean's List

North Carolina State University

Unofficial Transcript

Name: Steven Anthony Fisher **Student ID:** 000791297 **Birthdate:** 1988-05-10

2009 Spring Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
ENG 374	HI Film Since 1940	3.000	3.000	B+	9.999
MAE 356	Aerodynamics II	3.000	3.000	B	9.000
MAE 358	Exper Aerodyn II	1.000	1.000	B	3.000
MAE 462	Flight Veh Sta Con	3.000	3.000	A	12.000
MAE 472	Aerospace Struc II	3.000	3.000	B	9.000
MAE 473	Aero Struct II Lab	1.000	1.000	A	4.000
Term GPA: 3.357	Term Totals:	14.000	14.000	14.000	46.999

2009 Fall Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
MAE 452	Vstol Aerodynamics	3.000	3.000	A	12.000
MAE 455	Boundary Layer the	3.000	3.000	B-	8.001
MAE 466	Exper Aerodyn III	1.000	1.000	B-	2.667
MAE 469	Control Laboratory	1.000	1.000	A-	3.667
MAE 476	Rocket Propulsion	3.000	3.000	B+	9.999
MAE 478	Aero Vehi Design I	3.000	3.000	A	12.000
Term GPA: 3.452	Term Totals:	14.000	14.000	14.000	48.334

2010 Spring Term

Plan: Aerospace Engineering, Bachelor of Science
Session: Regular Academic Session

Course	Description	Attempted	Earned	Grade	Points
ENG 224	Ctmpry Wrld Lit II	3.000	3.000	A	12.000
ENG 331	Commun Engr & Tech	3.000	3.000	A-	11.001
MAE 479	Aero Veh Design II	4.000	4.000	A	16.000
PE 104	Swim Conditioning	1.000	1.000	S	0.000
STS 302	Cont Sci Tech Valu	3.000	3.000	A	12.000
Term GPA: 3.923	Term Totals:	14.000	14.000	13.000	51.001

Semester Dean's List

Undergraduate Career Totals

Cum GPA: 3.429 Cum Totals: 128.000 128.000 119.000 408.000

End of Unofficial Transcript

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Steven Fisher for a clerkship in your chambers. Steven received the highest grade in my Patent Law class (out of 35 students), received an A in my Property class, and was my teaching assistant for Property during his 2L year. Stated simply, Steven is the strongest, most qualified law student I have had the honor to teach. I have no doubt that Steven will make an excellent law clerk.

Aside from Steven's high marks in my classes, I can give my full recommendation for his candidacy for three other reasons. First, Steven enjoys intellectual challenges and is not afraid to speak up when an argument lacks logical consistency. He is extremely polite, but he has the confidence in his intellectual abilities (well-placed, in my opinion) to question the materials in class. For example, in my Property class, Steven's intellectual firepower was best demonstrated when he raised his hand to pose a question spontaneously. Steven's questions were often about the impact of a certain legal rule on the legal system as a whole or the result of that particular doctrine on people in the real world. Whereas many students during 1L year are preoccupied with simply trying to understand what the various legal doctrines are, Steven was thinking about the real world impact of those rules. Steven's presence in the classroom created an atmosphere of rigorous respect—something that one student rarely can achieve in a class of 80.

The second skill that sets Steven apart from most other law student is his excellent writing ability. Steven's exams in my Patent Law and Property classes demonstrated that he can rapidly compose crisp, coherent legal analyses. Additionally, I had the opportunity to view Steven's writing ability as he worked with me on a paper about how the right of publicity can be used to better protect genetic privacy. Steven has a very creative, agile mind and I saw this in action while working with him on his paper. He sees potential connections between disparate areas of the law and has an amazing ability to convey, in a logical manner, those connections to his readers. His writing is polished and refined in ways that will benefit him as an attorney and a law clerk. His paper was selected for publication in the American University Law Review, a deserving honor for an interesting and forward-looking piece.

Lastly, Steven is a truly outstanding researcher. I have observed his research abilities while working with him on his paper. After I read his first draft I was impressed with the depth of his ideas, but pointed to a different line of cases that might challenge his thesis. He took that constructive criticism as a challenge, returning with a new draft that both dealt with the line of cases that was potentially troubling and having done further research that strengthened his thesis. Based on his facility with research and his performance in my classes, I asked him to be my research assistance, but alas he was already working with another professor. Instead he worked as my teaching assistant for property. He was characteristically punctual turning in his weekly assignments and the quality was fantastic.

In short, Steven is the most gifted student I have ever had the pleasure of teaching, and this includes my time at American as well as my time at Berkeley. I am positive that Steven will be a wonderful asset to your chambers.

Yours truly,

Jonas Anderson

Professor and Associate Dean of Research
American University Washington College of Law
4300 Nebraska Avenue, Northwest
Washington, D.C., 20016
(202) 274-4273
janderson@wcl.american.edu

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Steve Fisher, a rising third-year student at American University, Washington College of Law, has asked me to write a letter in support of his application to serve as your law clerk. I am happy to do so, for I know Mr. Fisher and his work very well.

Just to establish my own credibility for purposes of this recommendation, please note that I have been a law professor for forty-six years, was a law clerk at the U.S. Court of Appeals for the Second Circuit, and have taught the law of habeas corpus to new and veteran state and federal judges under the auspices of the Federal Judicial Center and the ABA Appellate Judges' Conference for more than thirty years.

Steve Fisher is wonderful! He served as one of my research assistants from May 2020 to April 2021. He performed exceptionally well in all facets of his work — researching, drafting, editing, proofreading, and cite-checking. He is determined to do all of his work perfectly and on deadline. He is a mature person who is quiet and highly reflective, both in his demeanor and in his academic work. He exudes a quiet sense of self-confidence. He is also well-respected by his peers; one indication is that, several months ago, his peers elected him to be the Managing Editor of the American University Law Review.

In terms of his grades and rank in class, you will see from Steve's résumé that he has a 3.87 grade point average and is in the top 5% of his class. Although he does not yet know it, he is actually in the top 3% of the class; until graduation, our school rounds off class rankings only to the nearest 5%. I should also put Steve's grade point average into context. Grade inflation is not (or is no longer) an issue at our law school. Several years ago, the faculty instituted a mandatory mean for required first-year courses. That mean must be between a 3.10 and a 3.30. So for a student to have a more than a 3.91 gpa after his first year and a 3.87 after four semesters (Steve has nine "A" grades, two "A-" grades, and one "B+" grade) is no mean feat. It places Steve among the very top students in his class. (As you may be aware, our law school, like most others, gave only pass-fail grades in the Spring 2020 semester.)

In my opinion — based on decades of law school teaching and having sent hundreds of students on to judicial clerkships — Steve Fisher would come to you risk-free. I recommend him with great enthusiasm and without any reservations whatsoever.

Thank you very much for your attention and consideration. Please let me know if you think I can provide additional information.

Sincerely yours,

Ira P. Robbins
Barnard T. Welsh Scholar and
Professor of Law and Justice

Ira Robbins - robbins@wcl.american.edu - (202) 274-4235

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

With tremendous enthusiasm, I write to recommend my former student, Steve Fisher, for a judicial clerkship in your chambers. In his first year, I taught Steve in a 79-student section of Civil Procedure. This spring, I taught Steve in a 62-student section of Federal Courts. Steve was a standout in both classes, earning a very high A in each. Based on his mastery of complicated material and all of my very positive interaction with him to date, I plan to hire Steve to be my Federal Courts research and teaching assistant for next spring. Steve is, quite simply, the best of the best.

Academically, Steve can go shoulder to shoulder with students from any school. He has excelled in a number of hard courses, including not just Federal Courts and Civil Procedure but Legal Rhetoric (for which he received a Highest Grade Designation), Constitutional Law, and Patent Law, among others. In addition to getting top grades, he has distinguished himself on the American University Law Review. He was elected Managing Editor, and his comment was selected for publication. Steve is a research assistant to Professor Ira Robbins and a classroom teaching assistant to Professor Jonas Anderson, both of whom have been very pleased with his work.

Steve is poised, mature, and very likable. You will rely on him from day one and learn that your reliance is well-justified. Steve crosses every “i” and dots every “t.” He meets every deadline; he exudes good judgment; he submits drafts that always represent his best work; and he seems to love learning. He is a very quick study. Despite his accomplishments, he is also utterly unflappable. There is no drama swirling around Steve. He earns everyone’s respect without tooting his own horn. He does not need to; his work simply speaks for itself. Despite the pressure cooker that is law school these days, Steve calmly does the work and does it well, and his work product consistently places him at the very top.

Steve will thrive in any chambers. As a two-time law clerk myself (Judge Patricia Wald on the D.C. Circuit in 1993-1994 and Justice Sandra Day O’Connor in 1994-1995), I know that the judicial workload can be intense. If I were a judge, Steve is exactly the clerk I would want – brilliant, reliable, discreet, and completely graceful under pressure.

Please do not hesitate to contact me should you desire any additional information. As I hope is obvious, I am a very big fan.

Very truly yours,

Elizabeth Earle Beske
Assistant Professor of Law
Washington College of Law,
American University

Writing Sample

The attached writing sample is an excerpt from the Appellate Brief I wrote for my Legal Rhetoric course in the Spring of my 1L year. My partner and I argued on behalf of the government that an ordinance permitting hotel room searches upon reasonable suspicion fit within the special needs doctrine of the Fourth Amendment, and that the officers' subsequent identification of the suspect's house and seizure of evidence from his garage did not violate the Fourth Amendment. This excerpt contains my portion of the argument, specifically that the police officers did not violate the Fourth Amendment when they (1) used the suspect's garage door opener to identify his house and (2) seized evidence from the garage after observing it from the street when they used the opener. We were instructed to focus our plain view doctrine argument on whether probable cause existed and to ignore the issue of whether the officers violated the Fourth Amendment by entering the suspect's garage.

STATEMENT OF THE ISSUES

II. Under the Fourth Amendment, did the District Court appropriately deny the Motion to Suppress evidence obtained from the defendant's garage when police officers used the defendant's garage door opener solely to identify the defendant's house and, after clicking the opener, plainly saw guns that looked illegally short and a scale of the type frequently used in the drug trade while the garage door automatically opened and closed from their vantage point on a public street?

ARGUMENT

II. This Court should affirm the District Court's denial of the Motion to Suppress evidence from the garage because the police officers use' of the garage door opener was reasonable under the Fourth Amendment and it was immediately apparent to the officers that the items inside the garage were contraband.

Under the Fourth Amendment, warrants for searches are generally required, but exceptions exist that allow government action to be constitutionally reasonable without one. *United States v. Knights*, 534 U.S. 112, 121 (2001). Determining the reasonableness of a warrantless search depends on the balance between the extent of its intrusion on a person's privacy interests and its need to promote a legitimate government interest. *Id.* at 119.

First, the officers' use of Mitchell's garage door opener did not involve a trespass of Mitchell's property, J.A. at 6, so the reasonableness of their actions will depend on whether they intruded on Mitchell's privacy interests. *See Florida v. Jardines*, 569 U.S. 1, 9 (2013) (holding a search within the curtilage of the suspect's home was an unlawful trespass and therefore unreasonable under the Fourth Amendment). The officers acted within the scope of a legitimate government interest in determining Mitchell's home address and did not violate any significant privacy interest, rendering their actions reasonable under the Fourth Amendment.

Furthermore, the plain view doctrine's applicability to their observations will depend on the incriminating character of the scale and shortened gun because the officers were lawfully positioned on a public street and had lawful access to the opener that was seized from Mitchell at the hotel. J.A. at 5-6; *see Horton v. California*, 496 U.S. 128, 137-38 (1990) (seizing officer must be lawfully positioned and have lawful access to the plainly viewable object that has an immediately apparent incriminating character for the plain view doctrine to apply). The officers had probable cause to believe the scale and the gun were evidence of criminal activity; therefore, the plain view doctrine was appropriately applied.

A. The police officers' use of the garage door opener was reasonable under the Fourth Amendment because it did not violate the defendant's reasonable expectation of privacy or involve trespass on his property.

Testing a door to determine whether it belongs to a suspect is reasonable when it is in furtherance of a legitimate government interest and does not involve intrusion into more than an insignificant expectation of privacy. *United States v. Salgado*, 250 F.3d 438, 456 (6th Cir. 2001); *United States v. Concepcion*, 942 F.2d 1170, 1173 (7th Cir. 1991); *United States v. DeBardeleben*, 740 F.2d 440, 445 (6th Cir. 1984). A person's expectation of privacy must be one that society is willing to recognize as reasonable. *United States v. Jones*, 565 U.S. 400, 408 (2012); *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Courts have held that testing a lawfully obtained key in a suspect's lock from a public access point—such as a publicly accessible hallway—is not a Fourth Amendment search because the privacy interest in the lock is insignificant. *Salgado*, 250 F.3d at 456; *accord Concepcion*, 942 F.2d at 1173 (finding that an officer's actions constituted a search that did not violate the Fourth Amendment under almost identical circumstances). In *DeBardeleben*, an officer used keys to unlock the trunk of a car, which caused the trunk to open and afforded the acting officer a clear observation of the trunk's interior. 740 F.2d at 443. The court affirmed the denial of a

motion to suppress evidence from the car after a warrant was obtained to search it, finding that the insertion of car keys into the door and trunk "did not *search* the [car] but merely *identified* it as belonging to the defendant." *Id*. at 445; *see also United States v. Correa*, 908 F.3d 208, 219 (7th Cir. 2018) (holding that the officers' use of a garage door opener to identify a suspect's apartment building did not violate his privacy and therefore was a reasonable search).

The type of data held by electronic devices may determine the reasonableness of a search of that device. *Compare Correa*, 908 F.3d at 218-19 (finding that officers "interrogating" a garage door opener to find the building with which it matched was a reasonable search), *with Riley v. California*, 573 U.S. 373, 393 (2014) (holding that a warrantless search of a smartphone violated defendant's privacy due to the large amount of personal data it contained and was, therefore, unreasonable).

Society does not recognize a reasonable expectation of privacy in that which is exposed to the general public. An officer observing a suspect's garden by flying overhead in public airspace is a reasonable search because it is done in a physically nonintrusive way and from a public vantage point. *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *see also Katz*, 389 U.S. at 361 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). However, inspecting a suspect's home using "sense-enhancing" technology, even from a public vantage point, exceeds that which would be a reasonable search under the Fourth Amendment because that technology is unavailable to the public and the items seen using the technology therefore not exposed to the public. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

In this case, the Court should affirm the District Court's denial of the Motion to Suppress evidence recovered from the garage because the District Court appropriately determined that the

officers' actions did not constitute a search under the Fourth Amendment. Officers Shaffer and Pennoyer acted in furtherance of a legitimate government interest to identify Defendant Mitchell's residence and did so without unnecessarily intruding on his expectation of privacy.

Mitchell does not have an expectation of privacy in his address because it is public information. Officers Shaffer and Pennoyer were simply seeking to identify the address of the defendant. J.A. at 27. The same was true in *Salgado*, where the officer was identifying a suspect's address by matching the suspect's key to his apartment door lock. *Salgado*, 250 F.3d at 456; *accord Concepcion*, 942 F.2d at 1173 (testing a key in the suspect's apartment door lock to confirm his part in criminal activity was a reasonable search under the Fourth Amendment). The officers' actions are significantly different from those in *Kyllo*, where the police used infrared technology to determine that the defendant was growing marijuana in his home. *Kyllo*, 533 U.S. at 34. The court found that the infrared information was not publicly available and therefore constituted an unreasonable search. *Id.* The intention of Officers Shaffer and Pennoyer was to confirm the defendant's address, which did not violate an expectation of privacy, and their actions did not unreasonably exceed the intention of the search. Therefore, the use of the opener was not a search, or, alternatively, it was a reasonable search given the limited scope and lack of unlawful trespass by the officers.

Additionally, society would not find any privacy interest Mitchell claims in his garage door reasonable because his privacy interest in it is too insignificant. *Concepcion* demonstrated that the defendant did not have a significant privacy interest in his apartment door because it could be viewed and accessed from a public place. 942 F.2d at 1173; *accord Salgado*, 250 F.3d at 356. Mitchell's garage door was viewable from the public street, J.A. at 6, and he had no privacy interest in the fact that this opener opened his garage door. *See Correa*, 908 F.3d at 218

(holding that defendant had no meaningful privacy interest in the fact that a garage door opener matched his apartment building). The officers' actions were grounded in the authority set forth by *Concepcion* and *Salgado* in that they did not intrude on a privacy interest that society would find reasonable.

That the door opened because of the actions of officers Shaffer and Pennoyer does not implicate an intrusion of privacy because it was merely incidental to the officers' objective. In *DeBardeleben*, the court found that the officer's actions did not constitute a search under the Fourth Amendment and affirmed the denial of the defendant's motion to suppress evidence recovered from both the car and its trunk (pursuant to a warrant) despite the officer's view into its trunk while he tested the keys to confirm its possession by the defendant. 740 F.2d at 443-45. Similarly, Officers Shaffer and Pennoyer were merely identifying the defendant's address by using a garage door opener to find its match. J.A. at 6. Officer Shaffer immediately re-clicked the opener to close it, but, because of its design, the door opened fully before closing, allowing the officers a short glimpse into the garage. *Id*. at 6, 16, 27. The manual for the garage door opener indicates it must fully open before closing, but the officers could not have known this was the case as they only recovered the opener, not the manual, from Mitchell's possession. J.A. at 5. The events in this case are very similar to those of *DeBardeleben* and, therefore, the officers' actions do not constitute a search, or, alternatively, were reasonable under the Fourth Amendment.

B. The police officers' observation of contraband in Mitchell's garage was reasonable under the Fourth Amendment because the items were seen in plain view from a public space, and the officers immediately recognized the items' criminal nature.

The plain view doctrine allows search or seizure of an object that has incriminating characteristics which are immediately apparent when viewed from a lawful vantage point. *Texas*

v. Brown, 460 U.S. 730, 737 (1983). There must be probable cause to believe the object is incriminating based on the collective knowledge of the acting officers and under the totality of circumstances. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *United States v. Truitt*, 521 F.2d 1174, 1177 (6th Cir. 1975).

Incriminating characteristics that are immediately apparent are those that allow police officers to associate an object with the commission of a crime, regardless of whether that officer has previous knowledge of the plainly viewed items. An officer is not required to have evidence from a prior investigation; frequently, she may lawfully search or seize an incriminating item she spots inadvertently. *Brown*, 460 U.S. at 744 (holding that officer had probable cause to seize an opaque balloon containing heroin because of its immediately apparent criminality during a traffic stop even though police did not have specific suspicion that the driver possessed narcotics); *see also Hicks*, 480 U.S. at 326-27 (finding that the plain view doctrine did not apply to an officer's seizure of a stereo because its criminality was not immediately apparent).

An officer may have probable cause based on previous law enforcement experience and training that informs the officer's belief in an object's criminality. The officer in *Brown* had probable cause to suspect that a small balloon was filled with heroin because of his previous experience with narcotics arrests. *Brown*, 460 U.S. at 743. The court found that the officer had probable cause even though the balloon was only temporarily in sight before the defendant dropped it. *Id.*; *see also Ciraolo*, 476 U.S. at 209 (finding that an officer trained in identifying marijuana had probable cause after spotting marijuana on the suspect's property from 1,000 feet overhead).

Certain objects, like sawed-off shotguns, give an officer presumptive probable cause to suspect the items are contraband because they are intrinsically suspicious. The *Truitt* court found

that officers had probable cause to seize a sawed-off shotgun while executing a search warrant for gambling paraphernalia because legal ownership of the guns is rare and there is very little legitimate use for such a weapon. 521 F.2d at 1177; *accord United States v. Wade*, 30 F. App'x 368, 372 (6th Cir. 2002) (noting that "the length of the barrel [of a sawed-off shotgun] alone provides probable cause for a police officer to believe that the weapon is illegally possessed"); *Porter v. United States*, 335 F.2d 602, 607 (9th Cir. 1964) (finding that "a sawed-off shotgun in private hands is not an intrinsically innocent object" and that "possession of it is a serious crime, except under extraordinary circumstances").

Courts examine the totality of circumstances when determining whether an officer has probable cause. In *Brinegar*, an officer stopped a driver suspected of illegally transporting liquor across state lines based on his previous reputation, the direction the car was heading near the state line, and that the car looked abnormally weighed down. *Brinegar*, 338 U.S. at 162-63. The court held that the arresting officers had probable cause based on "judgment formed in the light of the particular situation and with account taken of all the circumstances." *Id.* at 176; *see also Brown*, 460 U.S. at 742 (noting that "[the probable cause standard] does not demand any showing [that] a belief is correct or more likely true than false," only that the officers believe the object is probably criminal).

In the present case, the District Court appropriately denied the Motion to Suppress evidence recovered from the garage because the plain view doctrine was appropriately applied to the officers' conduct when they discovered the evidence. That ruling should be affirmed because the court made no clearly erroneous finding of fact regarding the immediately apparent criminality of the items in the garage.

Officers Shaffer had probable cause to suspect that the scale in the garage was contraband based on his years of police experience. Officer Shaffer testified that he worked as a police officer for four years, and that, in his experience, the type of scale he observed in the garage was a "telltale sign of a drug distribution operation." J.A. at 27, 30. The officers were only thirty feet away from the garage at the time they spotted the seized items. J.A. at 6.; *see Ciraolo*, 476 U.S. at 213 (holding that officers trained to spot marijuana had probable cause that defendant was growing the plant in his garden after spotting it during a flyover at 1,000 feet).

The officers' probable cause to believe the shotguns were contraband is reinforced by the fact that one of the guns was actually short. They reported and testified that one of the guns was an illegal sawed-off shotgun. J.A. at 6, 30. Courts have routinely held that officers discovering sawed-off shotguns have well-founded suspicions in shortened shotguns because of their rarity and inherent dangerousness. *See, e.g., Wade*, 30 F. App'x at 373; *Truitt,* 521 F.2d at 1177; *Porter*, 335 F.2d at 607. This case is no different. During his cross examination, Officer Shaffer testified unequivocally and reaffirmed that "the guns looked short," J.A. at 30, and, therefore, he had probable cause that the guns were contraband. Moreover, the officers had ample time to make a determination about the criminality of the items in the time that the garage was open. J.A. at 6; *see Brown*, 460 U.S. at 743 (finding an officer had probable cause based on previous narcotics arrests despite only briefly seeing the item in question before the defendant dropped it).

Officers Pennoyer and Shaffer were not required to be *certain* that the items in the garage were contraband, they merely needed to have a reasonable belief that they were *probably* contraband based on the totality of circumstances. *See Brown*, 460 U.S at 742; *Brinegar*, 338 U.S. at 176. The circumstances include not only their previous police experience, but also Mitchell's dragon tattoo and possession of a powdery substance. J.A. at 5. These facts inform the

officers' probable cause because they tie Mitchell to a local gang and possession of narcotics, just as the officer in *Brinegar* had probable cause based on the reputation of the driver, the appearance of his car, the direction the defendant was traveling, and his proximity to the state border. *Brinegar*, 338 U.S. at 162-63, 176. Here, the District Court correctly found the officers had probable cause, and this Court should affirm that ruling because the District Court was not clearly erroneous.

CONCLUSION

For the aforementioned reasons, Officers Pennoyer and Shaffer's search of the motel room and use of the garage door opener were reasonable under the Fourth Amendment. Therefore, the Government requests that this Court affirm the Motion to Suppress evidence recovered from the motel and the garage and affirm Mitchell's conviction on all charges.

Applicant Details

First Name	**Shannon**
Last Name	**Forshay**
Citizenship Status	**U. S. Citizen**
Email Address	**shannon.a.forshay@emory.edu**
Address	**Address** **Street** **1231 Clairmont Rd, Apt 18D** **City** **Decatur** **State/Territory** **Georgia** **Zip** **30030** **Country** **United States**
Contact Phone Number	**5712649374**

Applicant Education

BA/BS From	**Mississippi State University**
Date of BA/BS	**May 2019**
JD/LLB From	**Emory University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=51101&yr=2009**
Date of JD/LLB	**May 15, 2022**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Emory Bankruptcy Developments Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Vandall, Frank
fvandal@emory.edu
404-727-6510

Bott, Steven
steven.bott@usda.gov
steven.bott@usda.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1231 Clairmont Road, Apt 18D
Decatur, GA 30030
Shannon.a.forshay@emory.edu
(571) 264-9374

June 2, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court
Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at Emory University School of Law passionate about litigation and public service. I am a Virginia native interested in serving as your 2022 term clerk and hope to return to Virginia permanently following graduation. As your term clerk, I would bring an outstanding academic record, valuable prior work experience, and high levels of enthusiasm to your chambers.

Joining the Federal Bar Association and serving as an executive editor for the *Emory Bankruptcy Developments Journal* sparked my interest in litigation. This upcoming summer, I will be working at Potter Anderson & Corroon, a corporate litigation and bankruptcy firm, to further refine my advocacy skills and to gain experience in private practice. Additionally, I will be externing with the Honorable Paul M. Baisier of the Northern District of Georgia U.S. Bankruptcy Court during the 2021 fall semester. As your law clerk, I aim to build on that knowledge and experience a diverse array of cases outside of bankruptcy proceedings.

I am personable, outgoing, and work well individually as well as in groups. I have a strong work ethic and enjoy contributing to the success of a team. I have experience drafting succinct legal documents on nuanced and cutting-edge topics, and have a firm understanding of citation editing according to the Bluebook. I would bring these traits plus my desire to learn and grow as a young advocate to your chambers.

Enclosed are my resume, law school transcript, undergraduate transcript, recommendations, and writing sample. Thank you for your consideration.

Sincerely,

Shannon Forshay

Enclosures

SHANNON FORSHAY

1231 Clairmont Road, Apt. 18D
Decatur, GA 30030
shannon.a.forshay@emory.edu
(571) 264-9374

EDUCATION

Emory University School of Law — **Atlanta, GA**
Juris Doctor Candidate — May 2022

- GPA 3.637 (Top 25%)
- Executive Notes and Comments Editor, *Emory Bankruptcy Developments Journal* (Vol. 38)
- Emory Public Interest Committee 2020 Grant Recipient
- 3L Representative, Emory Environmental Law Society

Mississippi State University — **Starkville, MS**
Bachelor of Arts, Political Science — May 2019

- GPA 4.0/4.0
- William A. Demmer Enviornmental and Energy Policy Scholar
- President, Mississippi State University Pre-Law Society
- Vice President and Founding Member, United Nations Association

EXPERIENCE

Georgia House Democratic Caucus — **Atlanta, GA**
Legal Extern — August 2020 – November 2020

- Conducted public policy and comparative law research for legislators
- Drafted memoranda and bills that advance Democratic values

U.S. Department of Agriculture, Office of the General Counsel — **Atlanta, GA**
Legal Intern — May 2020 – August 2020

- Researched and constructed legal memoranda on subjects including waterway jurisdiction and principles of federalism under the Property Clause of the Constitution
- Analyzed partial failure in title insurance claim standards in southern states and presented findings to USDA regional attorneys and Forest Service representatives

Cassidy & Associates — **Washington, D.C.**
Intern — May 2018 – August 2018

- Lobbied to remove an environmentally destructive policy rider from the NDAA
- Prepared educational memoranda for executive members of the firm on topics ranging from air pollution to technology grants for universities contracting with the federal government
- Conducted policy research projects alongside members of the firm to advance client needs

The Congressional Award Foundation — **Washington, D.C.**
Intern — January 2018 – May 2018

- Organized and hosted a large-scale poker tournament fundraiser for Members of Congress and their executive staff
- Vetted potential Congressional Award recipients and arranged state-wide award ceremonies with the corresponding congressional offices

The Watergate Hotel — **Washington, D.C.**
Rooftop Cocktail Waitress — May 2019 – August 2019

COMMUNITY SERVICE

- **Georgia Re-Entry Project**, Atlanta, GA. Assembled our client's parole request packet for submission to the Georgia Parole Board. (October 2019 – July 2020)
- **Know Your Rights**, Atlanta, GA. Taught middle schoolers their fundamental rights under the Constitution and how to navigate interactions with law enforcement. (August 2019 – February 2020)

Advising Document - Do Not Disseminate

Name: **Shannon Forshay**
Student ID: **2418540**

Institution Info: Emory University
Student Address: 5071 Wolf Run Shoals Rd
Woodbridge, VA 22192-5766
Print Date: 05/28/2021

Beginning of Academic Record

Fall 2019

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	B+	13.200
LAW	510	Legislation/Regulation	2.000	2.000	B	6.000
LAW	520	Contracts	4.000	4.000	A-	14.800
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	B	6.000
LAW	550	Torts	4.000	4.000	A-	14.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.425	Term Totals	16.000	16.000	16.000	54.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.425	Comb Totals	16.000	16.000	16.000	54.800
Cum GPA	3.425	Cum Totals	16.000	16.000	16.000	54.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.425	Comb Totals	16.000	16.000	16.000	54.800

Spring 2020

Program: Doctor of Law
Plan: Law Major

Semester significantly disrupted starting 3/11/2020 due to the Coronavirus COVID-19 outbreak. The law school adopted mandatory pass-fail grading for all spring 2020 courses, indicated by Satisfactory/Unsatisfactory grades. Arrangements were made for these courses to meet graduation requirements.

Course		Description	Attempted	Earned	Grade	Points
LAW	500X	Business Associations	3.000	3.000	S	0.000
LAW	525	Criminal Law	3.000	3.000	S	0.000
LAW	530	Constitutional Law I	4.000	4.000	S	0.000
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	S	0.000
LAW	545	Property	4.000	4.000	S	0.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	16.000	16.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	16.000	16.000	0.000	0.000
Cum GPA	3.425	Cum Totals	32.000	32.000	16.000	54.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.425	Comb Totals	32.000	32.000	16.000	54.800

Advising Document - Do Not Disseminate

Name: **Shannon Forshay**
Student ID: **2418540**

Fall 2020

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	640L	Federal Income Tax: Individual	4.000	4.000	A	16.000
LAW	659A	Doing Deals: Contract Drafting	3.000	3.000	A-	11.100
LAW	716	Bankruptcy	3.000	3.000	B+	9.900
LAW	838	Sem: Products Liability	3.000	3.000	A	12.000
LAW	870A	EXTERN: Public Interest	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
Course Topic:		Fieldwork: 150 Hours (2 units)				

			Attempted	Earned	GPA Units	Points
Term GPA	3.769	Term Totals	16.000	16.000	13.000	49.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.769	Comb Totals	16.000	16.000	13.000	49.000
Cum GPA	3.579	Cum Totals	48.000	48.000	29.000	103.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.579	Comb Totals	48.000	48.000	29.000	103.800

Spring 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	601B	First Amendment:Rel.Freedom	3.000	3.000	B+	9.900
LAW	624L	Climate Change Law	2.000	2.000	A	8.000
LAW	632X	Evidence	3.000	3.000	A	12.000
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	699	Kids in Conflict with Law	2.000	2.000	A-	7.400
LAW	883	Bankrptcy Devlp Journal:Second	2.000	2.000	A	8.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.775	Term Totals	14.000	14.000	12.000	45.300
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.775	Comb Totals	14.000	14.000	12.000	45.300
Cum GPA	3.637	Cum Totals	62.000	62.000	41.000	149.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.637	Comb Totals	62.000	62.000	41.000	149.100

Fall 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	622A	Const'lCrim.Proc:Investigation	3.000	0.000		0.000
LAW	649	Writing for Judicial Chambers	2.000	0.000		0.000
LAW	662	Education Law and Policy	2.000	0.000		0.000
LAW	695	Land Use	2.000	0.000		0.000
LAW	870E	EXTERN: Judicial	1.000	0.000		0.000
LAW	940	State & Multistate Taxation I	2.000	0.000		0.000

Advising Document - Do Not Disseminate

Name: **Shannon Forshay**
Student ID: **2418540**

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	12.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	12.000	0.000	0.000	0.000
Cum GPA	3.637	Cum Totals	74.000	62.000	41.000	149.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.637	Comb Totals	74.000	62.000	41.000	149.100
Law Career Totals						
Cum GPA:	3.637	Cum Totals	74.000	62.000	41.000	149.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.637	Comb Totals	74.000	62.000	41.000	149.100

End of Advising Document - Do Not Disseminate

June 02, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Re: Letter of Recommendation for Shannon Forshay

I am extremely pleased to receive an opportunity to write a letter of recommendation for Shannon Forshay. She was a student in my Torts class in the Fall of 2019 and earned an A- in a class of over 90 students.

She was always well-prepared and asked excellent questions both in class and after class.

Shannon was also a student in my Products liability Seminar in the Fall of 2020. She earned an outstanding grade of A and was a class leader in terms of asking challenging questions. Her paper “Profits over People: Products Liability Law and the Opioid Epidemic” was first rate. Her organizational and people skills is shown by the fact that she was an Editor on the Bankruptcy Journal.

Shannon is a most impressive student and will make an outstanding clerk. She also has an excellent sense of humor and will be a pleasure to work with.

Yours very truly,

Frank J. Vandall
Professor of Law

Frank Vandall - fvandal@emory.edu - 404-727-6510

United States Department of Agriculture
Office of the General Counsel

Eastern Region
1718 Peachtree Street, NW, Suite 576
Atlanta, Georgia 30309-2437

Telephone: 404-347-1060
Facsimile: 844-217-8320

March 8, 2021

Re: Shannon Forshay, Letter of Recommendation

Dear Judge:

This regional office represents U.S. Department of Agriculture [USDA] agencies in the southeastern United States, including the Forest Service. This past summer of 2020, Shannon Forshay worked for us as a summer intern. As the supervising attorney for many of Shannon's assignments, I highly recommend her for a judicial clerkship. She did an outstanding job and I would be very glad to have her as a colleague. Her analytical skills, writing ability, and intellectual reasoning are superior, as is her strong work ethic. Although she is a self-starter and works independently with minimum supervision, she also has great interpersonal skills which enabled her to blend into our office culture quickly and seamlessly.

I have been an attorney for over thirty-five years with the USDA Office of the General Counsel [OGC] and am also a retired Army Reserve Judge Advocate. During my professional career I have worked with many young lawyers and Shannon has impressed me as much as any of the outstanding young lawyers I have had the pleasure to work with and supervise. Because of her professional and personal attributes, I have absolutely no doubt that she will be an excellent lawyer and will fit into any office.

Among other issues and cases, Shannon worked on a complex natural resources and property law dilemma for me. This dilemma involved the questions as to whether the Forest Service has jurisdiction over a waterbody and, even if not, whether it can nonetheless regulate conduct on the waterbody to protect natural resources. When I explained the problem to her, she quickly grasped the relevant issues, did a great job researching the applicable law, and wrote a well-reasoned memorandum that I was basically able to adopt, sign and send to the Forest Service "as is." In short, she did a very thorough, in-depth analysis of the relevant issues that enabled the Forest Service to better develop and evaluate its possible courses of action.

In closing, Shannon earned my highest regard and recommendation for both the quality of her work and the speed with which she accomplished it. She will be a very valuable asset to any judge or law office. Should you care to further discuss Shannon's qualifications, please do not hesitate to contact me. My direct line is 404.347.1088, and my email address is steven.bott@usda.gov.

Sincerely,

Steven C. Bott

Steven C. Bott, Senior Counsel
Eastern Region, USDA OGC

LTC, U.S. Army Reserve, Ret.

SHANNON FORSHAY
1231 Clairmont Road, Apt. 18D
Decatur, GA 30030
shannon.a.forshay@emory.edu
(571) 264-9374

WRITING SAMPLE

The following is a memo from a United States Department of Agriculture, Office of the General Counsel research assignment. This memorandum is my original work product. I was given permission to use this document as a writing sample by the supervising attorney.

Written July 2020

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SUBJECT: **Extraterritorial Jurisdiction Over Silver Glen Springs Run**
Ocala National Forest, National Forests in Florida

I. Introduction

Silver Glen Springs Run ("the Run"), a popular natural spring surrounded by Forest Service land, is at risk of permanent environmental destruction. The Forest Service is interested in regulating the Run to reduce and remedy the environmental damage it has sustained from overuse and abuse. Regulating the Run presents two questions; First, whether the state of Florida or the Forest Service has jurisdiction over the Run. Second, whether the Forest Service may regulate a waterway that is owned by another entity.

II. Factual Background

The Ocala National Forest ("National Forest") consists of 383,000 acres of land that encompass four wilderness areas and 600 lakes, rivers, and springs. The Run is one of the four natural springs located within the National Forest and is part of the Forest Service's Silver Glen Springs Recreation Area. The Run is surrounded on all sides by national forest land and private property, except where it connects to Lake George, the second largest lake in Florida, which slowly flows up the St. Johns River to meet the Atlantic Ocean near Jacksonville. The Run is a heavily trafficked recreation area open to the public for fishing, swimming, and boating. The forest land immediately surrounding the Run offers hiking trails and picnic areas and is within a short distance of the Juniper Prairie Wilderness.

The Run boasts crystal-clear water and a diverse ecological habitat. In addition to the year-round human visitors, the Run is home to submerged aquatic vegetation, a variety of fish, turtles, alligators, bald eagles, otters, manatees, and other wildlife.

In recent years, the Run has sustained significant environmental damage. Without proactive management the Run will become permanently damaged and lose the natural qualities that make it attractive to wildlife and visitors. A study conducted by Pandion Systems, Inc. ("Pandion Systems") for the Florida Department of Environmental Protection indicates that limiting boat traffic and trampling will minimize the current damage and allow the dwindling vegetation in the Run to regenerate. Pandion Systems constructed four potential management options for the Run. Three out of the four options require the Forest Service to regulate the waterway, with the most proactive options calling for a complete ban of motorized boats or seasonal closure of the Run.

III. Legal Discussion

A. Under the Equal Footing Doctrine, Navigability at the Time of Statehood Determines Whether Title to a Riverbed is Vested in the State or Federal Government.

Ownership of a waterway is determined by the waterway's navigability at the time of statehood. Under the Equal Footing Doctrine, newly admitted states are entitled to the same rights as the original thirteen states, including the right to hold title to all navigable waterways in trust for the public.[1]

In PPL Montana, LLC v. Montana, the state of Montana sought to establish title to all portions of the state's riverbeds under the Equal Footing Doctrine, and to collect rent from a utility company that had built hydroelectric dams on segments of the Missouri and Madison rivers. At the time of dispute, the United States claimed title to the riverbeds beneath the dams and routinely collected rent from the utility company. The issue of the case ultimately became how to determine navigability and whether the state or the federal government had authority over the specific segments in question.

The Supreme Court unanimously held that the United States government retains title to any land beneath waters not navigable at the time of statehood.[2] The Court established multiple principles regarding navigability and ownership under the Equal Footing Doctrine:

1. States, in their capacity as sovereigns, hold title to the beds under navigable waters.

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[1] United States v. Holt State Bank, 270 U.S. 49 (1926); James B. Wadley, Recreational Use of Non-navigable Waterways, 56-DEC J. Kan. B.A. 27, 28-31 (1987).
[2] PPL Montana, LLC v. Montana, 565 U.S. 576 (2012).

2. Questions of navigability are governed by federal law. Under federal law, a waterway must be navigable in fact to be regarded as navigable in law.[3]

3. A waterway is navigable in fact if it was used, or was susceptible of being used, in its natural and ordinary condition, as a highway for trade and travel at the time of statehood.[4]

4. Navigability is determined on a segment by segment basis – "Courts are not to assume an entire river is navigable merely because certain reaches of the river are navigable."[5]

5. Present day recreational use of a river does not bear on navigability unless the segment was susceptible to being used in that manner at the time of statehood. At a minimum, parties seeking to use present day evidence regarding a river's use to establish navigability must show:

    a. The watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and

    b. The river's post-statehood condition is not materially different from its physical condition at statehood.

To summarize, a state holds title to the beds of all waterways that were navigable at the time of statehood. Non-navigable waters may be privately owned and are subject to the riparian rights of the rightful property owner.[6] As illustrated by the Kansas Supreme Court, "navigable water" is synonymous with "public water," which is rightfully owned by the state, while "non-navigable water" is synonymous with "private water."[7]

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[3] PPL Montana, LLC, 565 U.S. at 592; Holt State Bank, 270 U.S. at 56.
[4] Courts tend to focus on the ordinary conditions of the waterway rather than the actual or supposed use of the waterway at the time of statehood. See generally Utah v. United States, 403 U.S. 9, 11-13 (1971) (evidence that Great Salt Lake was sporadically used for trade by ranchers prior to statehood, in addition to its enabling natural conditions, was sufficient to prove the lake as navigable in fact); North Carolina v. Alcoa Power Generating, Inc., 853 F.3d 140, 152 (4th Cir. 2017) (expert testimony regarding the rough conditions of the waterway, and the inability of vessels in 1789 to navigate the rough conditions, was sufficient to find Yadkin River not navigable in fact); Stewart v. U.S. Dept. of Ag., 639 F.Supp.2d 1190 (D.Or. 2009) ("The test for navigability of title is not one of the past or present use, but one of the possibility of use.… The test of whether a water body is navigable in its "ordinary condition" depends upon the characteristics of the waterway itself; that is, its depth, its breadth, its length, the speed of the current and similar factors."); Lopez v. Smith, 109 So.2d 176, 178-80 (Fla. Dist. Ct. App. 1959) ("[navigable water] does not include … water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and low lands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation.") (quoting City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921)) (emphasis added).
[5] PPL Montana, LLC, 565 U.S. at 588 (quoting the Montana Supreme Court dissent).
[6] Piazzek v. Drainage Dist. No. 1 of Jefferson County, 237 P. 1059, 1060 (Kan. 1925). See also Donnelly v. U.S., 228 U.S. 243, 264 (1913) (non-navigable waters may be owned by the federal government or private citizens).
[7] Piazzek, 237 P. at 1060.

Navigability of a waterway determines the extent of a proprietor's riparian rights. Non-navigable waters may be privately owned and controlled by abutting property owners, while the beds of navigable waters are controlled by the state, with abutting property owners retaining the rights to ingress, egress, boating, bathing and fishing.[8] [9] Non-navigable riparian owners are entitled to equal use of the water and, unless a contrary intent is clearly expressed by the grantor, the presumption is that the boundary line between owners of lands bordering on a watercourses is in the middle thread of the watercourse.[10]

Here, the federal government most likely holds title to the Run. The Run's navigability at the time of Florida's statehood will determine whether title to the riverbed and authority over the Run was ceded to the state.[11] The Run should be assessed as an independent segment, separate from the navigable conditions of Lake George and the St. Johns River. The Run's navigability will turn on its usefulness in trade and travel in its natural and ordinary condition in 1845.[12] The Run was frequently used by ancient indigenous groups approximately 4,500 years ago, but its particular usefulness in trade and travel post-indigenous era is unclear.[13]

For the Run to be considered a navigable waterway, a court must find that it was used, or was susceptible of being used, as a highway for commerce in its ordinary condition and with the customary modes of travel at the time of statehood.[14] It is unlikely that the Run, in its natural condition in 1845, would meet this threshold.

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[8] Central Fla. Investments, Inc. v. Orange County Code Enforcement Bd., 790 So.2d 593 (Fla. Dist. Ct. App. 2001); Lee v. Williams, 711 So.2d 57 (Fla. Dist. Ct. App. 1998).
[9] Riparian rights exist in Florida as a matter of constitutional right and property law and are not dependent on enabling legislation. Riparian rights are subject to regulation under the police power. Central Fla. Investments, Inc., 790 So.2d at 597.
[10] Bischoff v. Walker, 107 So.3d 1165 (Fla. Dist. Ct. App. 2013). See also George A. Locke, Deeds: description of land conveyed by reference to river or stream as carrying to thread or center or only to bank thereof—modern status, 78 A.L.R.3d 604 (1977). See generally Calder v. Hillsboro Land Co.,122 So.2d 445, 458 (Fla. Dist. Ct. App. 1960) (lists the order of importance of survey calls in determining boundary lines).
[11] Statehood, FLORIDA DEPARTMENT OF STATE, https://dos.myflorida.com/florida-facts/florida-history/a-brief-history/statehood/ (Florida gained statehood on March 3, 1845).
[12] The Supreme Court specifically noted that mere use of a waterway by explorers and trappers to rest, reorient, care for animals, etc., is not enough in itself to establish navigability. PPL Montana, LLC, 565 U.S. at 600.
[13] Kenneth E. Sassaman, The Archaeology of Silver Glen Run, JUNIPER HISTORY, http://www.juniper.club/new-page-2; Silver Glen Springs – Ocala National Forest, Florida, EXPLORE SOUTHERN HISTORY (May 3, 2013) https://www.exploresouthernhistory.com/silverglen.html.
[14] Holt State Bank, 270 U.S. at 56. See also Lee, 711 So.2d at 58-59 (waters are not navigable merely because they are affected by the tides or connect to a larger, navigable waterway).

If the Run is deemed non-navigable, the Forest Service's jurisdiction will either extend to the middle thread of the Run's bed or to the shore of the National Forest.[15] Unless otherwise explicated in a property owner's deed, Florida law presumes property owners with land abutting non-navigable waters, such as the Run, are entitled to equal use of the water's surface and hold title to the bed extending from their property to the center thread of the waterway.[16]

B. The Forest Service May Regulate Conduct on Non-Federal Land Under the Property Clause of the Constitution if the Regulation Reasonably Relates to Protecting Public Land.

The Property Clause of the Constitution provides authority for the Forest Service to regulate waterways, and conduct upon those waterways, near public land that may imperil the conditions of the land. Article IV, Section III, of the Constitution provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting Territory or other Property belonging to the United States …." Property Clause jurisdiction is dependent upon enabling legislation by Congress.

In Kleppe v. New Mexico, the Supreme Court held the Property Clause may reach beyond territorial limits to protect federal property interests. The need for Congress, and federal agencies with delegated authority, to exercise police power under the Property Clause is measured by the exigency of the circumstances, a standard the Court established in Camfield v. U.S.[17] When evaluating a regulation under the Property Clause, the question becomes whether the regulation is a *needful* regulation *respecting* public lands.[18] The Court clarified that the Property Clause power necessarily includes protection of wildlife integral to public lands, and that damage to federal land is a sufficient basis for regulation, but does not suggest it is a necessary one.[19]

In U.S. v. Alford, the Supreme Court held that Congress may prohibit acts upon privately owned lands that imperil the publicly owned forests. The Defendant lit a fire on private land that later spread to inflammable grass on public land. The Defendant was charged under a statute prohibiting fires on the public domain near inflammable material and argued that the prohibition did not extend to fires lit on private property. The Court found that the nearness of the conduct or

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[15] The acquisition document must be reviewed before the Forest Service's property rights to the bed can be determined. See generally Alan J. Jacobs, John Kimpflen, & Stephen Lease, Construction of Particular Calls, 11 C.J.S. Boundaries § 58 (2011).
[16] See Bischoff, 107 So.3d at 1169-70.
[17] Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). See also Camfield v. United States, 167 U.S. 518, 525 (to not allow the federal government to exert police power over areas that affect public land would leave the federal government at the mercy of state legislatures).
[18] Kleppe, 426 U.S. at 536 (emphasis added).
[19] Kleppe, 426 U.S. at 537, 541.

threat should be the focus of the inquiry, not the ownership of the land where the threat originated.[20]

The Federal Circuits consistently affirm that Congress has plenary power to make needful rules respecting public lands, even in the absence of concurrent or exclusive jurisdiction.[21] In U.S. v. Lindsey, the Ninth Circuit declared, "it is well established that [the Property Clause] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters."[22]

In U.S. v. Brown, the Eighth Circuit analyzed whether the United States has jurisdiction to enforce regulations controlling activities on state waters within the boundaries of a National Park. The court held that the Property Clause requires an expansive reading, and that federal regulations over state waters that neighbor public lands are enforceable.[23] Federal agencies may use the Property Clause to regulate state waterways that affect the health and safety of wildlife or visitors on federal land.

Following U.S. v. Brown, the Eighth Circuit established a nexus test to analyze an exertion of authority under the Property Clause.[24] The court held that Congress is the ultimate arbitrator on whether the Property Clause is being extended properly, but Congress does not have plenary authority over conduct on nonfederal land; rather, Congress must demonstrate a nexus between regulated conduct and federal land, establishing that regulations are necessary to protect federal property.[25] If Congress's actions reasonably relate to the purpose of the governing act, the use of police power under the Property Clause is permissible. For example, if Congress enacts a motorized use restriction to protect the fundamental purpose for which a national forest is reserved, and if the restriction reasonably relates to that end, a court must conclude Congress acted within its constitutional prerogative.[26]

An agency must demonstrate that their need to regulate non-federal land under the Property Clause is not specious or indirect to satisfy the nexus.[27] In Grand Lakes Estates Homeowners Association v. Veneman, the Forest Service surpassed this threshold by demonstrating in the

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[20] United States v. Alford, 274 U.S. 264 (1927).
[21] Herr v. United States Forest Service, 865 F.3d 351 (6th Cir. 2017); United States v. Bohn, 622 F.3d 1129 (9th Cir. 2010); United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979); United States. v. Brown, 552 F.2d 817 (8th Cir. 1977).
[22] Lindsey, 595 F.2d at 6.
[23] Brown, 552 F.2d at 822.
[24] Minnesota v. Block, 660 F.2d 1240, 1250 (8th Cir. 1981).
[25] Block, 660 F.2d at 1250. (the regulation at issue limited motorized vehicle use on non-federal land and water surrounded by a federal wilderness area). See United States v. Stefanski, 2011 WL 899521 at *2 (D.Alaska 2011); Livingson v. United States, 2016 WL 1274013, at *5 (D.S.C., 2016) (an activity that has the *potential* to impact public lands may be regulated; actual entrance upon, or damage to, federal land is not necessary to justify regulation) (emphasis added).
[26] Block, 660 F.2d at 1250.
[27] Grand Lakes Estates Homeowners Ass'n v. Veneman, 340 F.Supp.2d 1162, 1168-69 (D.Colo. 2004).

administrative record that regulating the private waterway was necessary to conserve the Arapahoe National Recreation Area ("ANRA"). The Forest Service's concerns about fish and wildlife management, vegetation management, and fire prevention that affected the ANRA's Shadow Mountain Reservoir and surrounding area reasonably related to protection of federal land and therefore satisfied the Property Clause nexus.[28] The short distance between the ANRA and the private waterway suggests that the conduct upon the private waterway, if unregulated, could have an adverse effect on the public land.

Here, the Forest Service may regulate the Run pursuant to its regulatory authority under 16 U.S.C. § 551, 16 U.S.C.A. § 1609(a), and 36 C.F.R. § 261.50(a):[29]

- 16 U.S.C. § 551 grants the Secretary of Agriculture broad authority to protect the public forests from depredations, and to regulate forest use and occupancy in accordance with destruction deterrence.

- 16 U.S.C.A. § 1609(a) provides "the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories … The 'National Forest System' shall include … all national forest lands acquired through purchase, exchange, donation, or other means … and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system."

- 36 C.F.R § 261.50(a) confers authority upon each Regional Forester and Forest Supervisor to "issue orders which close or restrict the use of described areas within the area over which he has jurisdiction."

To exercise police power pursuant to the Property Clause, the Forest Service must demonstrate that regulating the Run reasonably relates to protection of the surrounding public land. There must be some nexus between the regulation and protection of federal property, however, protection of federal property is given a broad interpretation.[30] To satisfy the Property Clause

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[28] Veneman, 340 F.Supp.2d at 1168-69 ("there is ample evidence in the administrative record that the Forest Service was rightly concerned about water resources and general environmental issues relating to the ANRA generally, and Shadow Mountain Reservoir, in particular.").

[29] The majority of Property Clause case law presumes these statutes to be broad in scope and expansive enough to justify reaching beyond territorial limits. Cases that fail the Property Clause analysis tend to turn on the lack of statutory authority or a narrow interpretation of the statute. See United States v. Concrete, 2009 WL 733881, at *5 (C.D.Cal. 2009); Stewart v. U.S. Dept. of Ag., 639 F.Supp.2d 1190 (D.Or., 2009) (court held that the Forest Service needed more specific congressional authority than 16 U.S.C. § 1609(a) or 16 U.S.C. § 551 to exercise Property Clause jurisdiction over a state lake).

[30] See Veneman, 340 F.Supp.2d at 1167 (federal regulations may exceed territorial boundaries when necessary for the protection of *federal land or objectives*) (emphasis added).

nexus, the Forest Service must demonstrate, first, that damage to the Run will negatively impact the Silver Glen Springs Recreation Area or wildlife in the National Forest and, second, that the desired regulations reasonably relate to the goal of protection.

The Pandion Systems study provides compelling evidence for the necessity of regulating the Run. Regulating the Run will protect the entire area from further degradation of water quality, wildlife habitat, and recreational value. To bolster the Forest Service's regulatory authority under the Property Clause, it would be prudent to produce a report that demonstrates the direct effect destruction of the Run has on the National Forest. The Forest Service must prove that their decision to regulate non-federal land is not specious or indirect. Establishing a direct link between destruction of the Run and destruction of the National Forest would solidify the Forest Service's authority to regulate non-federal waters pursuant to the Property Clause.

IV. Conclusion

States acquire title to all navigable waterways within their borders at the time of statehood under the Equal Footing Doctrine; the federal government retains title to all non-navigable waterways. Navigability is determined by the waterway's particular usefulness in trade and travel in its natural condition at the time of statehood. The Run is most likely a non-navigable waterway. The Forest Service's property rights to the Run will be determined upon review of the acquisition document.

Congress may exert regulatory authority over non-federal waters that imperil the conditions of surrounding public land under the Property Clause of the Constitution. The Forest Service has broad statutory authority under 16 U.S.C. § 551, 16 U.S.C.A. § 1609(a), and 36 C.F.R. § 261.50(a) to issue regulations and closure orders that preserve public lands. The Forest Service may exercise police power over the Run if it can reasonably demonstrate that the non-federal water imperils the surrounding national forest, and that the enacted regulations reasonably relate to the overarching goal of preserving public land.

If you wish to discuss this matter further, please contact Shannon Forshay at 571.264.9374 (shannon.forshay@usda.gov) or Steven Bott at 404.347.1088 (steven.bott@usda.gov)

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WRITING SAMPLE

The following is my final paper from a class titled "Kids in Conflict with the Law." The goal of the assignment was to propose a novel solution to any problem within the juvenile justice system. This paper is my original work product. I was given permission to use this document as a writing sample by the course professor. I received an A on the final paper and an A- in the class.

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Introduction

Private criminal detention facilities are a point of contentious debate amongst criminal justice advocates. Over the past 20 years, private adult incarceration facilities have garnered swaths of negative publicity for their accused tendency to understaff, cut corners on spending, and mistreat their detainees.[1] As privatization of the adult system gains an increasingly negative reputation, the privatization of juvenile detention facilities has received similar criticism despite the juvenile justice system's unique circumstances. Juvenile detention centers and adult prisons face different issues that deserve different solutions. For the juvenile system, unlike the adult system, privatization is the best solution for rehabilitating at-risk youth.

The problem does not stem from a juvenile detention facility's business structure, but rather from how the government funds and incentivizes the detention facility's operation. Privately operated juvenile detention facilities, non-profit and for-profit, offer state juvenile justice departments an opportunity to sidestep red tape, political roadblocks, and funding issues to achieve the most conducive detention environment for juvenile offenders. Modifying juvenile justice statutes and state contract provisions for private detention organizations offers an avenue for states to ensure quality rehabilitation programs for detained youth. States should shift from publicly run juvenile detention facilities towards privately operated facilities that receive contract funding through positive rehabilitation rates, lowered recidivism rates, or educational achievement of the detainee population. Per diem funding of private juvenile facilities should be dispensed with entirely to reduce the incentive to purely incarcerate and punish.

This paper will explore state statutory provisions that authorize private contracting for juvenile detention centers, why private detention centers developed a misleading negative public image, and why privatization of juvenile detention centers is the best solution. Pennsylvania will be the state of focus because of its tumultuous history with private juvenile prisons, its relatively high rate of detained delinquents, and large number of private detention centers.[2] Following the introductory groundwork, this paper will propose statutory amendments and potential contract provisions that incentivize rehabilitation over pure incarceration. Modest adjustments to statutory language and industry incentives can create life-changing results for detained juvenile offenders.

Background

Rehabilitation of delinquent youth is the juvenile justice system's primary goal.[3] The juvenile justice system was built on the idea that "kids are different," which means they are in need of a different system and different solutions than adults.[4] As recognized by the Supreme Court, children lack maturity and a sense of responsibility for their actions, they are more

[1] *See generally Who Makes Money from Private Prisons?* (CNBC Dec. 29, 2019) (provides background on the pros and cons of adult private prisons and the politics behind private prisons. Features Emory Law's very own Professor Volokh), https://www.youtube.com/watch?v=3uv7iK5UxM4.

[2] *See* SARAH HOCKENBERRY, JUVENILES IN RESIDENTIAL PLACEMENT, U.S. DEP'T OF JUST. 7 (June 2020) (Juvenile justice statistics based on the Census of Juveniles in Residential Placement conducted by the Department of Justice). As of 2017, Pennsylvania had 100 juvenile detention facilities - 23 public and 77 private. On the census date, Pennsylvania had 1,791 children in out-of-home detention. *Id.*

[3] *See Youth in The Justice System: An Overview*, JUVENILE LAW CENTER, https://jlc.org/youth-justice-system-overview ("Today's juvenile justice system still maintains rehabilitation as its primary goal and distinguishes itself from the criminal justice system in important ways.").

[4] *See Roper v. Simmons*, 542 U.S. 551, 569-571 (2005); *Youth in The Justice System: An Overview*, JUVENILE LAW CENTER, https://jlc.org/youth-justice-system-overview ("states have recognized that children who commit crimes are different from adults; as a class, they are less blameworthy, and they have a greater capacity for change").

vulnerable to negative influences and peer pressure, and the character of a child is less fixed than an adult – in other words, they are easier to reshape and rehabilitate.[5]

With this goal in mind, all juvenile detention centers should be built with the intent of rehabilitating the detained juveniles. As it currently stands, youth detention centers are expensive and counterproductive to juvenile rehabilitation and development. Secure youth confinement increases the likelihood of recidivism and harms educational attainment, lifetime wages, and future health outcomes for youth.[6]

The temporary incarceration of delinquent offenders is a necessary evil in certain circumstances. States need a way to keep the community safe from violent youth offenders. The goal is to strike a reasonable balance between community safety and the individual juvenile's needs. While incarceration alone does not reduce recidivism or remedy youth behavior issues,[7] the restructuring of youth confinement centers can transform an otherwise negative experience for delinquents into a starting point for change.

The public disdain for private juvenile detention centers tends to be conflated with what is truly a public disapproval of juvenile confinement in general. Private detention centers and rehabilitation programs work within a broader, publicly operated juvenile justice system that is incentivized by the same underlying economic factors. Public money is being funneled to youth detention centers (both private and public) for the incarceration of juveniles alone. Facilities increase profits through higher sentencing rates and statutes that mandate detention for lesser crimes. When detention alone is the monetary incentive, "tough on crime" policies rise in popularity throughout the criminal detention industry.

In the late 1990's and early 2000's youth crime rates decreased, and states began shifting away from secure confinement to community-based programs.[8] According to Jeffery Butts, during this "brief period after the demand for secure confinement space began to drop, the juvenile justice system seemed to respond by lowering the standards for confinement and placing youth in secure facilities for less serious offenses."[9] This hyper-tendency to confine juvenile offenders, combined with big name scandals and the anti-privatization movement in the adult prison system, resulted in a demonized image of private facilities for juveniles.

The "Kids for Cash" scandal in Luzerne County, Pennsylvania heavily contributed to the negative perception of private juvenile detention centers. In Luzerne County, two juvenile judges, Mark Ciavarella and Michael Conahan, routinely funneled kids through the juvenile court system to place them in out-of-home confinement at two private confinement facilities that provided the judges financial kickbacks.[10] Between 2003-2008, the judges heard more than 6000 cases, over 50% of which lacked legal representation and 60% of those without counsel were adjudicated guilty and sent to out-of-home confinement.[11] In one of the most egregious instances, former Judge Ciavarella sentenced a 14 year old girl to a month in a detention center

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[5] *See Roper v. Simmons*, 542 U.S. 551, 569-571 (2005).
[6] *Sticker Shock 2020: The Cost of Youth Incarceration*, JUSTICE POLICY INSTITUTE (July 2020), http://www.justicepolicy.org/uploads/justicepolicy/documents/Sticker_Shock_2020.pdf.
[7] *See* Jeffery A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, CRIMINOLOGY & PUBLIC POLICY 361 (2019).
[8] *See* Jeffery A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, CRIMINOLOGY & PUBLIC POLICY 361 (2019).
[9] Jeffery A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, CRIMINOLOGY & PUBLIC POLICY (2019).
[10] *See Luzerne "Kids for Cash" Scandal*, JUVENILE LAW CENTER, https://jlc.org/luzerne-kids-cash-scandal.
[11] *See Luzerne "Kids for Cash" Scandal*, JUVENILE LAW CENTER, https://jlc.org/luzerne-kids-cash-scandal.

for creating a parody Myspace account for her school's vice principal.[12] According to the Juvenile Law Center, the Kids for Cash scandal is one of the largest judicial corruption scandals in American history and altered the lives of more than 2500 children.[13]

The Kids for Cash scandal illustrates the consequences of poorly drafted statutes and contracts that incentivize confinement alone. The private detention facilities needed their beds filled to receive full funding from the state, and the juvenile judges benefited from the financial bonuses and the "tough on crime" appearance they adopted to justify harsh sentences for undeserving children. Despite the Kids for Cash horror story that unfolded in Pennsylvania, per-diem contract structures and loosely drafted statutes are the enemy, not privately operated juvenile detention centers.

Most juvenile facilities are currently funded using a per-diem structure. Per-diem payment structures are the equivalent of a "day-by-day" room and board contract that earns a facility revenue based on the number of beds filled per-day.[14] When a child is placed in a juvenile detention facility, the organization operating the facility will charge daily room and board and sometimes other fees to the court or division of government that referred the youth to the facility.[15] This structure inherently creates a headhunter-like system that motivates detention centers and other players within the juvenile justice system to increase or maintain the amount of children in detention with no regard for the child's rehabilitation needs. Per-diem structures encourage cost-cutting within facilities,[16] which usually comes at the expense of the detainees' rehabilitation programing and health care access. Whether the center is operated by a public or private entity is irrelevant when the overarching economic incentives remain the same.

Despite the misleading negative reputation attached to private juvenile detention centers, private facilities tend to be better for confined youth than public facilities.[17] Private facilities tend to hold smaller populations and less violent offenders, allowing the facility to provide individualized care and a greater sense of safety amongst residents.[18] In contrast, public facilities tend to be overcrowded, secure facilities that detain mass quantities of juveniles at once with

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[12] Ed Pilkington, *Jailed for a Myspace Parody, the Student Who Exposed America's Cash for Kids Scandal*, THE GUARDIAN (Mar. 6, 2009), https://www.theguardian.com/world/2009/mar/07/juvenille-judges-cash-detention-centre.

[13] *See Luzerne "Kids for Cash" Scandal*, JUVENILE LAW CENTER, https://jlc.org/luzerne-kids-cash-scandal. *See generally* Swindled Podcast: The Judges (can be found on Spotify), https://swindledpodcast.com/podcasts/season-1/10-the-judges/.

[14] Pam Clark, *Desktop Guide to Quality Practice for Working with Youth in Confinement, Chapter 2: Types of Facilities*, NATIONAL INSTITUTE OF CORRECTIONS, https://info.nicic.gov/dtg/node/4.

[15] Pam Clark, *Desktop Guide to Quality Practice for Working with Youth in Confinement, Chapter 2: Types of Facilities*, NATIONAL INSTITUTE OF CORRECTIONS, https://info.nicic.gov/dtg/node/4.

[16] "Cost cutting within facilities" means reducing the amount of money it takes to sustain each prisoner per-day to maximize the price the facility has placed on the juvenile's per-day cost. Reducing programing and access to basic amenities like fitness equipment and health care allows facilities to reduce their baseline expenses without lowering the amount they are reporting to the government for funding. *See generally Who Makes Money from Private Prisons*? (CNBC Dec. 29, 2019) (minute 3:42 discusses this alleged issue within adult private prisons), https://www.youtube.com/watch?v=3uv7iK5UxM4.

[17] *See* SARAH HOCKENBERRY, JUVENILES IN RESIDENTIAL PLACEMENT, U.S. DEP'T OF JUST. (June 2020) (Juvenile justice statistics based on the Census of Juveniles in Residential Placement conducted by the Department of Justice).

[18] *See* SARAH HOCKENBERRY, JUVENILES IN RESIDENTIAL PLACEMENT, U.S. DEP'T OF JUST. 5 (June 2020) (Juvenile justice statistics based on the Census of Juveniles in Residential Placement conducted by the Department of Justice). This study found that private facilities tend to hold more status offenders and non-violent delinquents, while state run facilities held more violent delinquents.

minimal individual attention.[19] Based on data gathered from the Census of Juveniles in Residential Placement, the Department of Justice observed that although "many states reported having more private than public facilities on the census date, 47 states indicated they had more offenders in their public facilities than private in 2017."[20] This observation is indicative of the overcrowded, sardines-in-a-can style detention facilities run by public entities. As aptly stated by the authors of a study on juvenile detention center quality, "in contracting with private corporations, we could hardly do worse than the quality of the environment that already exists in many public correctional facilities."[21]

In their study comparing environmental factors of private and public juvenile detention centers, Gaylene Armstrong and Doris MacKenzie concluded that direct ownership of the detention center mattered very little.[22] Instead, two distinct facility characteristics controlled how well detainees rated their experience: facility capacity and age of the facility.[23] The results of the study demonstrated that private facilities were significantly smaller and newer compared to public facilities – "Overall, the capacity of private facilities ranged from 24 to 150 juvenile delinquents; the capacity of public facilities ranged from 28 to 548 juvenile delinquents."[24] Private facilities are better able to perform in these two pivotal categories, making them more conducive to juvenile detainees than public facilities. Additionally, private facilities tend to be nonsecure facilities, meaning they are smaller with less traditional prison-like features that make the environment unwelcoming and rigid. The authors of the study found that only 20% of private facilities are high security, while about 80% of public facilities are "closed" and secure facilities.[25]

Private facilities outperform their public counterparts because they are able to offer smaller facility sizes with individualized care and avoid political roadblocks that arise in the public sector. Private sector facilities can tap into private funds and investors to build new facilities, while public facilities must utilize public funds (taxes) to justify expanded programs and new facilities, a task that involves convincing politicians and taxpayers.[26] The economic bind felt by public facilities drives them to seek out "the most economic method," which usually results in the repurposing of old public structures.[27] Juveniles in older facilities perceived their

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[19] *See* SARAH HOCKENBERRY, JUVENILES IN RESIDENTIAL PLACEMENT, U.S. DEP'T OF JUST. 5 (June 2020) (Juvenile justice statistics based on the Census of Juveniles in Residential Placement conducted by the Department of Justice).
[20] *See* SARAH HOCKENBERRY, JUVENILES IN RESIDENTIAL PLACEMENT, U.S. DEP'T OF JUST. 5 (June 2020) (Juvenile justice statistics based on the Census of Juveniles in Residential Placement conducted by the Department of Justice).
[21] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 545 (2003).
[22] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 550 (2003).
[23] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 550 (2003).
[24] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 555 (2003). Juveniles in smaller facilities perceived their environment to have significantly more activity, be more caring and just, and have a higher overall quality of life compared to the perception of juveniles in larger facilities. Kids in smaller facilities also reported higher perceptions of safety in their environment. *Id.*
[25] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 543 (2003).
[26] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 556 (2003).
[27] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 556 (2003).

environments as providing a worse quality of life, less structure, and more risks in terms of danger presented by other inmates, staff, and the environment itself.[28] A private entity's ability to act swiftly, with help from outside funding, and without interference from uninformed and obstructionist politicians and community members makes privately operated detention facilities superior to their publicly-run counterparts.

The Solution

Refocusing the underlying economic incentives of the juvenile detention industry through restructured contracts and tighter statutory provisions is the best way to ensure detained juveniles are rehabilitated rather than purely confined and punished. Per-diem detention center payment structures must be eliminated. With Pennsylvania as the primary example, this section will focus on the current state of juvenile detention statutes and how these statutes and their associated government contracts should be amended.

A. Current Statutory Framework

Matters pertaining to juvenile justice are codified under Chapter 63, Title 42 of the Pennsylvania Code (the "Code").[29] The Code's stated purpose for Pennsylvania's "Juvenile Act" (the "Act") provides:

> (2) Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, *care and rehabilitation* which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the *development of competencies to enable children to become responsible and productive members of the community*.[30]

Immediately following the prescribed purpose of the Act, the Code provides that the state shall impose "confinement [for a delinquent child] only if necessary and for the minimum amount of time that is consistent with the purposes under paragraphs … (2)."[31]

Pennsylvania defines a "Delinquent Child" as "[a] child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or *rehabilitation*."[32] A private juvenile detention center is titled a "private agency" and is codified as "[a]n entity that provides out-of-home placement services to children under a contract with a county agency."[33] Subchapter B of the Act enables private contracting for juvenile detention centers. It provides: "A child alleged to be delinquent may be detained only in: … (3) A … center or other facility for delinquent children which is under the direction or supervision of the court or other public authority or *private agency*, and is approved by the Department of Public Welfare."[34]

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[28] Gaylene Styve Armstrong & Doris Layton MacKenzie, *Private Versus Public Correctional Facilities: Do Differences in Environmental Quality Exist?*, 49 CRIME & DELINQUENCY 542, 556 (2003).
[29] *See* 42 PA. CONS. AND STAT. § 63 (West 2021).
[30] 42 PA. CONS. AND STAT. § 6301(b)(2) (West 2021) (emphasis added).
[31] 42 PA. CONS. AND STAT. § 6301(3)(ii) (West 2021).
[32] 42 PA. CONS. AND STAT. § 6302 (West 2021) (emphasis added).
[33] 42 PA. CONS. AND STAT. § 6302 (West 2021).
[34] 42 PA. CONS. AND STAT. § 6327(a) (West 2021) (emphasis added). Part (f) of 42 § 6327 authorizes oversight of detention facilities by the Department of Public Welfare. This provision gives the Department of Public Welfare

While § 6327 enables private detention centers for juveniles awaiting adjudication, § 6352 addresses confinement for children adjudicated delinquent. In relevant part, § 6352 provides:

> If the child is found to be a delinquent child the court may make any of the following orders of disposition … (3) Committing the child to an institution, youth development center, camp, or other facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Department of Public Welfare. (4) If the child is 12 years of age or older, committing the child to an institution operated by the Department of Public Welfare.[35]

Authorization of private detention centers for adjudicated delinquents is implied by subsection (4) which authorizes commitment to any institution operated by the Department.

Pennsylvania funds its detention centers through the Department of Public Welfare (the "Department"). The Department's funding provisions entail:

> (a) The department shall reimburse county institution districts or their successors for expenditures incurred by them in the performance … [of the Juvenile Act] in the following percentages: … 4) *Fifty percent of the actual cost of care* and support of a child … committed by a court pursuant to … [the Juvenile Act], … to the legal custody of a public or private agency approved or operated by the department …. The Auditor General shall also ascertain for each Commonwealth institution or facility rendering services to delinquent or deprived children *the actual average daily cost* of providing said services.[36]

This statute authorizes per-diem funding for juvenile detention centers at the cost of the Department and the juvenile's guardian. The state covers up to 50% of the cost of juvenile detention while the juvenile's parent or legal guardian is expected to pay the remaining cost.[37]

B. Amendments to the Existing Framework

To fulfill § 6301's mandate of rehabilitation for confined delinquents, Pennsylvania must eliminate § 704.1's call for per diem funding for juvenile detention centers. The Department's statutory call to action should encompass payment structures that provide funding for detention centers with high rehabilitation rates and ample programing that will reduce juvenile recidivism. The statutes focus must be to incentivize greater programing and care rather than pure punishment and the bare minimum to keep the detainees alive.

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authority to oversee and assist in the development of private juvenile detention centers. *See* 42 PA. CONS. AND STAT. § 6327(f) (West 2021).

[35] 42 PA. CONS. AND STAT. § 6352 (West 2021).

[36] 62 PA. CONS. AND STAT. § 704.1 (West 2021) (emphasis added).

[37] Subsection (e) describes the legal obligation of the parent to partially fund the juvenile's detention. Parents may petition the court for a judicial waiver of payment. The statute provides, "[i]f, after due notice to the parents or other persons legally obligated to care for and support the child, and after affording them an opportunity to be heard, the court finds that they are financially able to pay all or part of the costs and expenses stated in subsection (a), the court may order them to pay the same and prescribe the manner of payment." 62 PA. CONS. AND STAT. § 704.1(e) (West 2021).

In general, it is best to draft broad statutory mandates that allow the acting agency to experiment with solutions for the prescribed problem. Most legislators are not experts in juvenile detention center contract drafting, but the Department of Public Welfare is and should be given the authority to act accordingly. The statutory call provided by the amended legislation should grant the Department discretion to experiment with new detention facility payment structures but should mandate that per diem structures be eliminated and rehabilitation take priority.

For ease of re-drafting and understanding,[38] § 704.1(a)(4) should be eliminated entirely and rewritten in a new provision titled "§ 704.1b *Payment to Private Agencies for Care of Children*" – the remainder of the original § 704.1 would be left the same and retitled § 704.1a. Below is draft language for the proposed provision:

> § 704.1b *Payment to Private Agencies for Care of Children*:
> (a) The department shall govern affairs with all private agencies authorized by the department to detain juveniles committed by a court pursuant to the Juvenile Act.
>
> (b) The department shall reimburse private agencies for costs incurred in pursuit of rehabilitation of the detained juveniles. The Auditor General shall maintain data on the welfare and rehabilitation of the juveniles detained by each private agency. The department shall grant greater funds to private agencies that demonstrate juvenile recidivism rates below the threshold established by the department.[39]
>
> (c) The department may offer financial bonuses or grants to facilities that demonstrate exceptional rehabilitation services for detained youth. The department shall establish standards that define "exceptional rehabilitation services" and shall evaluate each private agency according to the defined standards.
>
> (d) The department may not reimburse private agencies for the actual daily cost of care of the child alone.

For clarity, § 6352 should be amended to explicitly authorize detention of juveniles adjudicated delinquent in private detention facilities. Below is the amended language:[40]

> (4) If the child is 12 years of age or older, committing the child to an institution operated or approved by the Department of Public Welfare. The child may be

[38] § 704.1 governs more than detention center funding. Amending within the given provision would require changing language in the introduction and all of the following subsections. Creating a § 704.1b is more efficient and easier for the reader.

[39] This provision is inspired by Pennsylvania's movement to base bonuses for halfway houses on recidivism rates – "In 2013, the Pennsylvania Department of Corrections rewrote its contracts with private firms managing the halfway houses that provide transitional residences for newly released inmates. To incentivize recidivism reductions, the new contracts included bonuses for companies with recidivism rates below a designated benchmark and penalized those with higher recidivism numbers." Jeffery A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, CRIMINOLOGY & PUBLIC POLICY (2019).

[40] The language in red is the proposed language. The language in black is the existing statute.

committed to a public or private agency approved by the Department of Public Welfare.

Under the proposed statutory language, the Department would be free to restructure private detention contracts with rehabilitation as the primary focus. One method of funding could be establishing a fixed number of beds that all facilities shall maintain year-round and are guaranteed state funding for, regardless of whether the beds are filled or not. With this guaranteed bed-space funding, the state could offer an additional funding structure that increases the amount a facility could receive based on the programs offered and the recidivism data gathered from the specific facility over time. Facilities that "cut-corners" on spending for rehabilitation efforts to maximize profits will be in violation of their contract and would be at risk of losing their state contract entirely.

Establishing a fixed number of guaranteed beds also creates an implied facility capacity cap. As previously discussed, children fare better in smaller facilities with more individualized care. The fixed number of state funded beds incentivizes facilities to only provide the specified number of beds and to keep facilities small. For facilities that do wish to add additional beds, the department can institute rigorous standards that require the facility to explain why they must exceed the established number of beds and cannot provide state funds for the additional beds.

Providing a fixed number of beds with guaranteed funding 1) reduces the uncertainty in facility funding that results in under-staffing or abrupt layoffs which harms the surrounding community, and 2) reduces the headhunter-like aspect of detaining kids for cash. If a facility's funding is not dependent on the number of bodies in their beds, they have no incentive to lobby for greater punishment periods or more severe punishment that result in confinement for less serious crimes.

Finally, states could add contract provisions that legally compel private facilities to offer rehabilitation programs or educational services for the detainees even in economic downturns,[41] a stipulation that would remedy the "cost-cutting" concern held by criminal justice advocates. Once the controlling state department is given discretion to institute creative funding structures that are not contingent on per diem funding, private detention centers will be more inclined to invest in rehabilitation efforts that benefit the state and community as a whole in the long term.

Conclusion

Government contracts and monetary incentives control the world. Structuring state codes and government contracts to prioritize rehabilitation for detained youth is the best way to achieve the juvenile justice system's goal of shaping youth to become productive members of society. Pure incarceration that does not prioritize rehabilitation is destructive to the individual child and community at large.

The goal of amending a state's juvenile detention statutes and contracts is to eliminate any potential monetary incentive for detaining children. Ownership of the facility matters very little when the underlying incentives are structured to disadvantage the detained population. Once funding statutes and contracts are revised, whether the facility is publicly or privately operated will determine the facility's ability to adapt to the new incentives. Private companies are better situated to offer smaller, safer, and newer living conditions as well as better-funded programs to detained delinquents than public facilities. For this reason, states should shift away

[41] *See* Jeffery A. Butts & John Pfaff, *It's About Quality: Private Confinement Facilities in Juvenile Justice*, CRIMINOLOGY & PUBLIC POLICY (2019).

from public juvenile detention centers towards private facilities that are better positioned to care for juveniles and adapt quickly to amended contracts.

Applicant Details

First Name	**Janet**
Middle Initial	**E**
Last Name	**Franklin**
Citizenship Status	**U. S. Citizen**
Email Address	**janet.evelyn.franklin@gmail.com**
Address	**Address** Street **5742 Moses Street** City **Chubbuck** State/Territory **Idaho** Zip **83202** Country **United States**
Contact Phone Number	**3017859217**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2007**
JD/LLB From	**University of Baltimore School of Law** **http://www.law.ubalt.edu**
Date of JD/LLB	**May 22, 2018**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Team**

Bar Admission

Admission(s)	**Maryland**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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April 8, 2022

The Hon. Elizabeth W. Hanes
United States District Court for Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a deputy prosecuting attorney for Bingham County, Idaho, and a former law clerk to the Hon. Debra M. Brown, United States District Judge for the Northern District of Mississippi. I am writing to apply for a 2022–2023 clerkship in your chambers.

I am seeking this position because I am passionate about litigation. In Bingham County, I prosecute drug possession and drug trafficking; driving under the influence, both misdemeanors and felonies; felony eluding; and assaults and batteries on law enforcement personnel. I also assist with handling the misdemeanor docket. I have first-chaired two jury trials since I took this position in April 2021 and both trials resulted in convictions on all counts.

While I find my work in Bingham County deeply meaningful, my family plans to return to the Washington, D.C., metropolitan area following my husband's retirement from the United States Army this summer. Furthermore, I am seeking a position which involves more research and writing than my current position entails. After clerking, I wish to practice criminal law in federal courts as an Assistant United States Attorney.

Enclosed please find my resume, law school transcript, list of references, and writing sample. The writing sample is a successful response I drafted to a motion to suppress in December 2021.

Should you require additional information, please do not hesitate to contact me. Thank you for your consideration.

Sincerely,

Janet Franklin

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BAR ADMISSIONS & MEMBERSHIPS

Admitted in Maryland, December 2018, Washington, D.C., July 2020, and Idaho, January 2021.

EDUCATION

UNIVERSITY OF BALTIMORE SCHOOL OF LAW, Baltimore, MD
J.D., *summa cum laude,* May 2018
G.P.A.: 3.980; Class Rank: 2/203 (Top 5%)
Honors: *University of Baltimore Law Review* – Associate Comments Editor; National Moot Court Team – National Finalist; Region III Runner Up; Best Brief Award; Moot Court Competition – Best Oral Advocate; Highest Grade Awards – Contracts I, Introduction to Lawyering Skills, Civil Procedure II, Evidence, and Constitutional Criminal Procedure I; Contracts I Law Scholar – Fall 2016

UNIVERSITY OF MARYLAND, College Park, MD
B.A. in Criminology & Criminal Justice, Minor in Astronomy, May 2007
G.P.A.: 3.74
Honors: Phi Beta Kappa Honor Society
Activities: Alpha Phi Sigma National Criminal Justice Honor Society, Omega Iota Chapter – President

LEGAL EXPERIENCE

BINGHAM COUNTY PROSECUTING ATTORNEY'S OFFICE, Blackfoot, ID
Deputy Prosecuting Attorney, April 2021 – present
First-chaired two jury trials: the first in August 2021, which resulted in a guilty verdict when a single count of battery on a law enforcement officer was charged; the second in March 2022, which resulted in guilty verdicts on all counts when two counts of aggravated assault on a law enforcement officer, felony eluding, felony possession of a controlled substance, and a persistent violator sentencing enhancement were charged. Prosecuted felony drug possession, drug trafficking, assaults and batteries on certain personnel, driving under the influence, eluding, and various misdemeanor cases; secured no-contact orders on behalf of victims and State witnesses; briefed and successfully argued against motions to suppress evidence.

HAWLEY TROXELL ENNIS & HAWLEY LLP, Pocatello, ID
Associate – Commercial Litigation Group, January 2020 – August 2020
Drafted motions seeking dismissal and summary judgment; conducted legal research regarding employer liability for various forms of subordinate misconduct, including driving under the influence by employees and negligence committed by medical professionals and other independent contractors; prepared attorneys for oral arguments and depositions.

HON. DEBRA M. BROWN, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, Greenville, MS
Judicial Law Clerk, April 2019 – November 2019
Prepared bench memorandum and draft opinion for Her Honor's sitting by designation on the United States Court of Appeals for the Fifth Circuit in a case determining whether an attorney's failure to object to a constructive amendment constituted ineffective assistance of counsel. Prepared draft memorandum opinions and orders disposing of motions for summary judgment; dismissal; and remand.

VENABLE LLP, Baltimore, MD
Associate – Real Estate Group, October 2018 – March 2019
Conducted research for a brief filed in the Maryland Court of Appeals concerning causation in asbestos exposure cases and Maryland tort principles distinguishing valid inferences from impermissible speculation; conducted research and drafted memoranda for pro bono litigation matters, including a commercial landlord-tenant dispute and a petition for Special Juvenile Immigrant Status.

Summer Associate, Summer 2017
Performed research in support of a United States Supreme Court petition for certiorari regarding Rule 37(c)(1) sanctions for willful discovery abuse. Assisted in the preparation of a successful oral argument before the Maryland Court of Appeals by researching, evaluating, and developing arguments regarding the language required to exclude property from marital property. Prepared research memoranda on a variety of topics including secured transactions, design defects, and the permissible scope of interrogatories. Assisted in updating MARYLAND CORPORATION LAW by James J. Hanks, Jr., by conducting a survey of all cases in the United States decided since the previous year's update which applied Maryland corporation law.

BOB PARSONS VETERANS ADVOCACY CLINIC, Baltimore, MD
Rule 19 Student Attorney, Fall 2017
Drafted a brief on behalf of an appellant in the Court of Appeals for Veterans Claims which resulted in a remand of all seven issues raised. Researched issues regarding claims for total disability based on individual unemployability, as well as rating increases through the theories of extraschedular consideration, functional loss, and secondary service connection.

OFFICE OF THE ATTORNEY GENERAL, Pikesville, MD
Intern, Summer 2016 and Spring 2017
Assisted in drafting a motion to dismiss concerning 42 U.S.C. § 1983 facial and as-applied challenges to a workplace regulation, as well as § 1983 claims of retaliatory discharge, which led to a voluntary dismissal by the plaintiff. Drafted memoranda on relevant Fourth Amendment rulings which were circulated agency-wide. Interviewed troopers and Maryland State Police senior training staff in the course of an excessive force lawsuit.

HON. PAUL W. GRIMM, U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND, Greenbelt, MD
Judicial Intern, May 2016 – November 2016
Drafted memorandum opinions on numerous motions, including a motion to vacate a prisoner's sentence due to ineffective assistance of counsel; a motion seeking default judgment; and a motion to enforce an arbitration agreement.

MONTGOMERY COUNTY STATE'S ATTORNEY'S OFFICE, Rockville, MD
Intern – Serious Crimes Unit, Spring 2014
Drafted a sentencing memorandum that resulted in a sex offender's 50-year sentence; prepared transcripts of interviews; compiled witness lists.

Janet Franklin
University of Baltimore School of Law
Cumulative GPA: 3.980

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	Lande	A	4.0	
ILS/Civil Procedure I (LARW)	Koller	A+	3.0	My A+ is for the lawyering skills (legal writing) aspect of the course.
Criminal Law	Stone	A	3.0	
ILS/Civil Procedure I	Koller	A	3.0	"ILS" is "introduction to lawyering skills" and is taught in conjunction with Civil Procedure. My "A" grade is for the Civil Procedure part of the course.
Contracts I	Sloan	A+	3.0	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Ram	A	4.0	
Jurisprudence	Starger	A	3.0	
Contracts II	Tiefer	A	3.0	
Constitutional Law I	Peters	B	4.0	
Introduction to Advocacy	Diamond	A	2.0	Second-semester legal writing course

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court Board	Peabody	CR	1.0	Ungraded course
Constitutional Law II	Higginbotham	B	2.0	
Law Review	Lande	CR	1.0	Ungraded course
Professional Responsibility	Diamond	A	3.0	
National Moot Court	Peabody	CR	2.0	Ungraded course
Judicial Externship	Taylor	PS	3.0	Pass/Fail course

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Attorney Externship	Levi	PS	3.0	Pass/Fail course
Law Review	Lande	CR	1.0	
Civil Procedure II	Koller	A+	3.0	
Evidence	Smalkin	A+	3.0	
Moot Court Board	Peabody	CR	1.0	

International Human Rights Seminar	Bessler	A	3.0	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Veterans Advocacy Clinic I	McClean	A+	6.0	
Litigation Process	Zane	A	3.0	
Law Review	Lande	CR	1.0	
Commercial Law	Sparks	A-	4.0	
Advanced Legal Research	Starger	A	2.0	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Wehle	A	3.0	
Legal Research Workshop	Colvin	A	2.0	
Special Topics in Law: Essential Skills for the Bar Exam	Sparks	PS	3.0	
Administrative Law	Wehle	A-	3.0	
Law Review	Lande	CR	1.0	
Constitutional Criminal Procedure I	Sidhu	A+	3.0	

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February 18, 2022

Dear Judge:

I am submitting this letter of recommendation on behalf of Janet Franklin. Janet is a 2018 graduate of the University of Baltimore School of Law who has applied for a clerkship in your chambers. I have known Janet since her first semester of law school when she was a student in my Contracts class. I'm pleased to give her my highest recommendation.

Janet's reasoning and writing ability are superb and would make her an asset in your chambers. Janet demonstrated her outstanding legal skills as a student. She is, quite simply, one of the smartest students I have ever had in more than 25 years of teaching. To give just one example of her skills, she earned an A+ in Contracts. Under our grading guidelines, faculty do not have to give A+ grades, and in fact, are limited to one A+ grade per class. Janet's performance was so far above that of her classmates that the decision to award an A+ was very easy. Her analysis and writing were clear, concise, and insightful. If you look at the rest of her transcript, you will see that her Contracts grade was not an outlier. She was a great student because she is incredibly smart and talented.

Janet's skills have continued to mature since she graduated. Most recently, she has been working as a county prosecutor, but she has also worked in law firms and as a law clerk at the U.S. District Court for the Northern District of Mississippi. This diversity of practice experience makes her well positioned to work on the range of legal issues in the cases before you. Ultimately, she would like to pursue a career as an Assistant U.S. Attorney. A position as your law clerk would help her achieve this professional goal.

Additionally, Janet's professionalism and good judgment would make her an excellent law clerk. She is a hard worker who completes her work thoroughly and on time. She is an independent learner. She is personable and professional. You and your staff would enjoy working with her.

Having been a law clerk myself, I know how judges rely on clerks to support them. Janet has the skills and temperament to succeed as a law clerk. I hope you will give her application serious consideration. If you need further information, you can reach me at (410) 837-6529 or asloan@ubalt.edu.

Sincerely,

Amy E. Sloan
Professor of Law

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The attached writing sample is a successful response I drafted to a motion to suppress in the District Court of the Seventh Judicial District of the State of Idaho in December 2021. The defendant has been given a pseudonym.

I. STATEMENT OF FACTS

On September 14, 2021, Officers Chad Purser, Henery Dannehl, and Joseph Pacheco of the Shelley Police Department were dispatched to the parking lot of Family Dollar to investigate a report that a man was slumped over the steering wheel of his truck. Ex. A, Purser Report. Officer Dannehl approached the truck on the driver's side and attempted to wake the man while Officer Purser observed the scene. *Id.* After several seconds, the man awoke and identified himself as Jonathan Smith. *Id.* Officer Purser was aware, through Mr. Smith's previous interactions with law enforcement, that he had a history of drug abuse.

Officer Dannehl observed a boxcutter-like knife on the truck's dashboard, on the driver's side and directly in front of Mr. Smith, and removed it. Officer Purser observed a bandana in Mr. Smith's hands, which were in his lap. *See id.* He appeared to be attempting to hide the bandana from the officers' view. *Id.* Officer Purser observed Mr. Smith moving the bandana towards his waistband area. Concerned that the bandana may contain a knife or some other weapon, Officer Purser instructed Mr. Smith to exit his truck. Officer Purser asked Mr. Smith to give him the bandana, and he refused. *Id.* Officer Dannehl then grabbed Mr. Smith's wrist, causing him to release the bandana, and placed him in handcuffs. *See id.* After Officer Purser took the bandana from Mr. Smith, he felt the contours of an object through the fabric which were consistent with "a pipe used when using narcotics." *Id.* He then asked Mr. Smith what was in the bandana, to which Mr. Smith replied "meth pipe." Officer Purser subsequently removed the pipe from the bandana. The officers conducted a search of Mr. Smith's person, which produced a small clear baggie of pills and a small clear baggie containing a white powdery substance. *Id.*

II. ARGUMENT

Mr. Smith asserts three grounds to suppress the contraband found and statements made during his encounter with the Shelley Police Department officers: (1) that the officers exceeded their community caretaking function by searching Mr. Smith; (2) that the search was unsupported by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 21 (1968); and (3) that Mr. Smith was questioned in custody prior to receiving a *Miranda* warning. *See generally* Def.'s Mot. The State shall address the first two assertions of wrongdoing together.

a. Officer Purser's search was justified under *Terry v. Ohio* because Officer Purser had objective grounds to believe Mr. Smith posed a risk of danger; the removal of the pipe from the bandana was lawful under the "plain feel" exception to the search warrant requirement; and the baggies of suspected controlled substances were discovered pursuant to a search incident to arrest.

As a preliminary matter, Mr. Smith is correct that a warrantless search occurred early in officers' contact with him on September 14, 2021, when Officer Purser ordered Mr. Smith to release the bandana. However, Officer Purser did not conduct the search as part of his community caretaking duties, but rather as a means of self-protection. After he determined through sensation that the object concealed within the bandana was not a weapon, but instead contraband, he lawfully removed the contraband pursuant to the "plain feel" doctrine. The officers arrested Mr. Smith and discovered additional contraband items in a search incident to that arrest.

i. Officer Purser's removal of the bandana from Mr. Smith's person was a justified, protective search under *Terry v. Ohio* because the presence of a knife in Mr. Smith's immediate vicinity, Mr. Smith's attempt to conceal the bandana by moving it towards his waistband, and his appearance of being under the influence of illicit drugs gave rise, under the totality of the circumstances, to objective grounds for Officer Purser to believe Mr. Smith posed a risk of danger.

The Fourth Amendment to the United States Constitution provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants

> shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 17 of the Idaho Constitution essentially mirrors the Fourth Amendment.[1] The Fourth Amendment's prohibition against unreasonable searches and seizures is enforceable against federal and state government bodies by the "sanction of exclusion." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Warrantless searches are presumptively unreasonable; the State bears the burden of showing that a warrantless search falls within an exception to the general warrant requirement or is otherwise reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

"One such exception allows an officer to conduct a limited self-protective pat down search of a detainee in order to remove any weapons." *State v. Henage*, 143 Idaho 655, 660, 152 P.3d 16, 21 (2006) (citing *State v. Wright*, 134 Idaho 79, 82, 996 P.2d 298, 301 (2000)). The purpose of the self-protective search is to permit a law enforcement officer to conduct an inquiry "without fear of violence being inflicted upon the officer's person." *Id.* (quoting *State v. Rawlings*, 121 Idaho 930, 933, 829 P.2d 520, 523 (1992)). When an officer has a reasonable fear for his own or others' safety, "he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* at 661, 152 P.3d at 22 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The physical scope of the protective search has expanded to include areas other than strictly the friskee's clothing. *See State v. Wright*, 134 Idaho 79, 82–83, 996 P.2d 298, 301–02 (2000) (search of defendant's purse was reasonable when defendant clutched her purse and appeared agitated after officers observed a knife in the vicinity). A protective search is reasonable

[1] The term "Oath or affirmation" is replaced by the term "affidavit." *Compare* U.S. CONST. amend. IV *with* Idaho CONST. art. I, § 17.